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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 32

CHRISTIAN F. BRAEN, PETITIONER,

vs.

PFEIFER OIL TRANSPORTATION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1959
CERTIORARI GRANTED MARCH 30, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 706

CHRISTIAN F. BRAEN, PETITIONER,

vs.

PFEIFER OIL TRANSPORTATION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

IN UNITED COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Appellant's Appendix—Filed May 14, 1958

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

DOCKET ENTRIES

13929 Docket Cal. No. 1590

CHRISTIAN F. BRAEN,

vs.

PFEIFER OIL TRANSPORTATION CO. INC.

Attorney for Plaintiff:
BERNARD ROLNICK,
320 Broadway, N. Y. C. 7.

Attorneys for Defendant:
PURDY, LAMB & CATOGGIO,
80 Broad St., N. Y. C. 4.

BASIS OF ACTION:
Tort Negligence—Damages for Personal Injuries—Marine-Jones Act.
Seeks—$110,000.00

JURY TRIAL CLAIMED: √

13929

Christian F. Braen vs. Preifer Oil Transportation Co. Inc.

Date	Filings—Proceedings
11- 4-53	Complaint Filed—Summons Issued
11- 9-53	Summons ret'd & filed—served on Deft.
12-10-53	Answer Filed
12-15-53	Note of Issue Filed
5-19-55	Rayfiel, J. Pretrial adjd. to June Term
[fol. 2]	
6- 3-55	Notice of Objections to Interrogatories etc. Filed 6-15-55
6-14-55	Rayfiel, J. No answer pre trial adjd. 6/21
6-15-55	Byers, J. Hearing on objections to interrogatories Adjd. to June-22-1955
6-22-55	Byers, J. Hearing on objections to interrog.—Adjd. to 6-29-55
6-24-55	Rayfiel, J. Pre trial adjd. Oct.
6-29-55	Byers, J. Hearing on objections to interrog.—Adjd. to 7-20-55
7-20-55	Inch, J. Hearing on objections to interrog.—Adjd. to 8-24-55
8-10-55	Notice of motion filed for summary judgt. etc. (8-24-55)
8-24-55	Abruzzo, J. Motion filed for summary judgt. adj. to 9-14-55
9-14-55	Rayfiel, J. Motions on objection to interrogatories and to dismiss complaint adjd. to Oct. 5-55
10- 5-55	Inch, J. Hearing on objections granted as indicated. Settle order on notice.
	Inch, J. Motion for summary judgt. argued—decision reserved.
	Affidavit of Thomas J. Irving filed.
	Affidavit of Christian F. Braen filed.

10- 5-55 Inch, J. Decision rendered on motion for summary judgment. Motion denied—Settle order (see memo)

10-26-55 By Inch, J. Order Filed Denying Motion For Summary Judg't

[fol. 3]

5-25-56 Answer to Interrogatories Filed

11- 8-56 Before Abruzzo, J. Case adjd. to Nov. 14-56

11-14-56 Before Abruzzo, J. Case adjd. to Nov. 21-56 11.30 AM

11-21-56 Before Abruzzo, J. Case Called—R & P.

11- 4-57 Rayfiel, J. Case Called—R. S.

12- 2-57 Bruchhausen, J. Case Called—R & P.

12-16-57 Bruchhausen, J. Case Called—Trial Ordered & adjd. to 12/17/57

12-17-57 Bruchhausen, J. Case Called—Trial resumed & adjd. to 12/18/57

12-18-57 Bruchhausen, J. Case Called—Trial resumed & Concluded. Jury returned verdict in favor of the Plaintiff in the sum of $38,000.00 and the Court Ordered Judgment accordingly.
Judgment Filed
Order of Sustenance Filed

12-24-57 Transcript of record filed

12-27-57 Notice of Motion Filed to Set Aside Judgment etc. 12-31-57

12-31-57 Bruchhausen, J. Motion submitted.

1- 3-58 Bill of Costs Filed: Costs Taxed and Docketed against Deft. in the sum of $41.40.

1-16-58 By Bruchhausen, J. Decision on Motion to Set Aside Judgt. Motion Denied—See Memo.

2-13-58 Notice of Appeal & bond filed.
Copy of notice of appeal to Atty. for Pltff.

4-15-58 Request to charge filed.

[fol. 4]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Judgment Civil No. 13929

CHRISTIAN F. BRAEN, Plaintiff,

vs.

PFEIFER OIL TRANSPORTATION CO., INC., Defendant.

JUDGMENT—December 18, 1957

The Jury empanelled in the above entitled action having rendered a verdict in favor of the plaintiff in the sum of $38,000.00

It is accordingly adjudged that judgment be and is hereby entered for said sum and that judgment be docketed accordingly and that the Bill of Costs when taxed be docketed.

Dated: Brooklyn, New York.
December 18, 1957

Sidney R. Feuer, Clerk.
By Charles J. Playne, Deputy Clerk.

[fol. 5]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury, now that the presentation of evidence in this action has been completed, it is the function of the Court to instruct you on the law.

You are the sole judges of the facts in the case.

Statements made by counsel in support of their objections, in summations, or otherwise, are not proof, although they may be helpful to you in ascertaining the truth. Your

recollection of the testimony, however, is what you should take into consideration in arriving at your verdict.

The Court made rulings in the course of the trial in admitting or excluding evidence, or otherwise. You are obligated to accept those rulings on the law, and the instructions as given in this charge.

The evidence, as distinguished from the law, is within your province to consider.

None of the rulings made by the Court or statements made by it are to be regarded by you as an indication of the Court's opinion on the issues of fact.

The plaintiff in this action is Christian F. Braen. The defendant is Pfeifer Oil Transportation Company, Inc.

There are some matters that seem not to be in dispute, namely, that the plaintiff was in the employ of the defendant; that the accident occurred on January 22nd, 1953, on a barge known as the Winesook, which was owned by the defendant Pfeifer Company, as was the Pfeifer II, upon which the plaintiff had worked as a member of the crew prior to the time of the accident.

While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.

Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine.

[fol. 6] So that we now come to a consideration as to whether or not the plaintiff has established his claim as a seaman and injuries in accordance with the provisions of the Jones Act and that act is that one of the elements of sustaining a claim is that he must show that the defendant was negligent in whole or in part, and I emphasize that in whole or in part because if there is any negligence on the part of the defendant, why, then there must be a recovery by the plaintiff.

Now, on the question of negligence, the defendant is obligated to furnish the plaintiff with a reasonably safe place in which to work, namely, such a place as would be

furnished by a reasonably prudent person under the circumstances.

This is a continuing duty and obligation and non-delegable. An employee such as the plaintiff does not assume the risks of his employment if the jury determines as a fact that the plaintiff's injuries resulted in whole or in part from the negligence of the defendant.

Now, the claim of negligence is that a certain catwalk and some of the apparatus in connection with it was defective or in poor condition.

One of the elements in order to sustain the plaintiff's claim on negligence is either to show that the defendants were actually notified of this condition within a reasonable time, or that they should, by its existence, if it had existed for a reasonable length of time in advance of the accident, should have been informed of that condition by a reasonable inspection and reasonable considerations of the matter.

If the plaintiff's accident was wholly his own fault, without any negligence on the part of the defendant, of course, he may not recover.

If you find that the plaintiff's negligence contributed to the accident, you should reduce his recovery by such percentage of contributory negligence as you find existed.

I shall mention that item in detail later.

[fol. 7] The burden or obligation is upon the plaintiff to persuade you by a fair preponderance of evidence as to the truth of his claims. Preponderance of evidence does not necessarily mean the greater number of witnesses, but it means the quality of the testimony of the witnesses and of the other evidence.

The defendant has no duty to disprove any of the plaintiff's claims.

If you find as to any of the plaintiff's claims that the evidence is evenly balanced, then you must find for the defendant on such claim.

If you find that the plaintiff sustained personal injuries by reason of the negligence in whole or in part of the defendant and that such negligence was the proximate cause of the accident, then you may determine the amount of such damages.

The fact that I now charge you on that subject does not mean that I have formed an opinion as to whether there was negligence, but I am obliged to fully charge you on all matters bearing on this case.

The amount of damages asked for by the plaintiff or mentioned in his complaint or in comment to you is not evidence in this case.

In fixing the amount of damages you may take into consideration the compensation or loss of earnings, pain and suffering up to the present time, and if you determine that the injuries will continue or be permanent, damages for loss of earnings and pain and suffering during such period of time as you find they will continue. You may consider in that connection any loss of earnings by reason of any change in employment due to the nature of the injury, or which may have prevented him from advancement from one position to another which might have been more remunerative.

If you find that the injuries are permanent you may take into consideration the life expectancy table but you are not bound to do so.

[fol. 8] The plaintiff's life expectancy is 18.79 years.

If you find that the defendant was negligent but also find that the negligence of the plaintiff contributed to the accident, such contributory negligence of the plaintiff does not bar any recovery by him. The burden of proving such contributory negligence of the plaintiff is upon the defendant.

You must determine the proportion or percentage of such contributory negligence, if any, and you must then diminish or reduce the plaintiff's damages in proportion to the amount of negligence attributable by you to the plaintiff.

Sympathy should not enter into your deliberation and should have no part therein. Both parties stand equal before the Court and are entitled to even-handed justice. The fact that the plaintiff is an individual while the defendant is a corporation should in no wise influence your judgment.

The quality of the testimony of the particular witnesses, regardless of who calls them, rather than the quantity or the number of witnesses is the test to be used in arriving

at your decision. There is no presumption that the witnesses for the plaintiff are more or less truthful or credible than the witnesses for the defendant.

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this you are entitled to take into consideration their bias, if any, their relationship to the parties, their interest in the outcome of the case, if any interest exists, their manner of testifying, their candor and frankness and any other test which you would ordinarily use in judging the weight to be given to the statements of persons with whom you come in contact.

It is for you, and you alone, to decide which testimony you shall accept.

If you find that any witnesses wilfully testified falsely to a material fact in the case, you may disregard his testi- [fol. 9] mony altogether, but you are not bound to do so and you may accept such testimony as you believe to be true and reject such testimony as you believe to be false.

While it is essential that your verdict should represent the opinion of each individual juror, it by no means follows that individual opinions may not be changed by conference in the jury room. The object of the jury system is to secure by comparison of views and by argument one concerted opinion, provided that it can be done reasonably and consistently with the individual convictions of each juror. Each juror should listen, with a disposition toward being convinced, to the opinions and arguments of the others. It is not intended that each juror should go into the jury room with a fixed opinion that cannot be shaken.

There can be no verdict of the jury, either for the plaintiff or for the defendant, unless such a verdict is unanimous.

If you agree upon a verdict, such a verdict should be either for the plaintiff for the amount of his damages expressed in dollars or for the defendant.

Finally, if you desire to examine any of the exhibits, they will be delivered to you, when requested.

Are there any exceptions to the charge and additional requests to charge?

Mr. Kilroe: There are no exceptions or requests, your Honor.

Mr. Lamb: May I come up?
The Court: Yes.

(Out of the hearing of the jury:)

The Court: Any exceptions by the defendant?

Mr. Lamb: I would like to except to that portion of your Honor's charge where you said that it is not seriously disputed that at the time of the accident he was a member of the crew of the barge Pfeifer II, and I would like to except to that portion of your Honor's charge immediately following that, in that you failed to give to the jury any norm or test for determining whether or not the plaintiff would be entitled to recover under the Jones Act, as a [fol. 10] seaman member of a crew. I also would like to except to your Honor's failure to charge any of the requests which I submitted to your Honor.

I don't believe you charged any of my requests, your Honor.

The Court: I thought I did.

Mr. Lamb: I could not distinguish them in the charge, your Honor, and therefore I should like to take exception to your failure to charge my requests No. 1, No. 2, No. 3 and No. 4.

The Court: I decline to charge except as I have charged.

Mr. Lamb: In view of that rule that they have been announcing at the Circuit Court, I do feel that you didn't give the jury here any means of determining how they could tell how this man was or whether this man was a member of the crew.

The Court: I thought I stated there was evidence here as to what he had been doing as a member of the crew from which they could gather whether he was functioning as a member of the crew.

Mr. Lamb: Your Honor didn't tell them anything with respect to whether or not what he might previously have been doing as a member of the crew, what relation that would be to the examination as to whether the work he was doing at the time—

The Court: I just can't understand that.

It would seem to me from what I understand the rule to be that the character of the work that the crew man does

prior to the accident is pretty good evidence of what his duties are as a seaman and a definition of his work.

Mr. Kilroe: And whether he is a member of that crew.

The Court: And whether he is a member of the crew, of course.

Mr. Lamb: I don't want to get into a discussion with you. I want to make it clear that I take it that your Honor is not charging that the work that the man was doing at [fol. 11] the time, the character and nature of the work is a determining factor.

You are not charging that?

The Court: I won't charge excepting as I have charged.

Mr. Lamb: Then I would like to take an exception.

The Court: All right.

(The following was before the jury:)

The Court: I just want to make one amendment to my statement to you, ladies and gentlemen.

I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently according to the defendant's statement, he says that is a serious issue.

So I will leave that as an issue.

It is my duty to discharge the alternates who have served a useful function here.

The Clerk will now swear the marshals.

(The marshals were sworn.)

The Court: All right. I direct you jurors now to be taken to luncheon, and return after a reasonable time for deliberations of this case.

(The jury was then excused, at one o'clock P. M.)

[fol. 12]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT'S REQUESTS TO CHARGE

Defendant respectfully requests the Court to charge the jury as follows:

1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge PFEIFER #2 prior to

his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the PFEIFER #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the PFEIFER #2 expressly for the purpose of furthering the repair of the PFEIFER #2 in order to enable it to continue in navigation, your verdict must be for the defendant.

Purdy, Lamb & Catoggio, Attorneys for Defendants.

[fol. 13]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR JUDGMENT OR FOR NEW TRIAL—
December 23, 1957

Sirs:

Please Take Notice that defendant, Pfeifer Oil Transportation Company does hereby move pursuant to Rule 50(b) of the Rules of Civil Procedure to have the verdict in favor of the plaintiff against the defendant, Pfeifer Oil Transportation Company in the amount of $38,000.00 and any judgment which may have been entered thereon, set aside and for judgment in favor of defendant, Pfeifer Oil Transportation Company and against the plaintiff in accordance with the motions for a directed verdict made by

the defendant, Pfeifer Oil Transportation Company at the close of all the evidence upon the trial of this action.

Please Take Further Notice that the defendant, Pfeifer Oil Transportation Company does also move in the alternative, pursuant to Rule 50(b) and Rule 59 of the Rules of Civil Procedure, for a new trial upon the ground that the verdict of the jury was contrary to the law, contrary to the evidence, is excessive, and upon the ground that the case was erroneously submitted to the jury without proper instructions as to whether plaintiff was a member [fol. 14] of the crew of the barge PFEIFER #2 at the time of the accident.

Please Take Further Notice that the undersigned will bring the above motions on for hearing before this Court at the Courtroom thereof for the hearing of motions on the 31st day of December, 1957 at 10:00 A. M. in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, New York
December 23rd, 1957.

Purdy, Lamb & Catoggio, Attorneys for Defendant,
By Vincent A. Catoggio, Office and P. O. Address,
80 Broad Street, New York 4, New York.

To:

Bernard Rolnick, Esq., Attorney for Plaintiff, 320 Broadway, New York, New York.

[fol. 15]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed November 4, 1953

Action under special rule for seamen to sue without security and pre-payment of fees for the enforcement of Laws of the United States for the protection of Health and Safety at Sea

Plaintiff complaining of the defendant, by his attorney, Bernard Rolnick, Esq., respectfully shows to this Court and alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

First: Upon information and belief, that at all times hereinafter mentioned, the defendant was and still is a corporation organized and existing under the laws of the State of New York, or is duly licensed to do business in the State of New York, and maintains an office for the transaction of business within the jurisdiction of this Honorable Court.

Second: That upon information and belief, at all times hereinafter mentioned, the defendant owned, operated, controlled and managed a certain vessel known as the Barge PFEIFER No. 2, a vessel of American registry, flying the American flag.

Third: That the plaintiff was employed by the defendant on board said vessel, in or about the month of August, 1952, in the capacity of Barge Captain, at an agreed monthly rate of wages.

[fol. 16] Fourth: That on or about the 22nd day of January, 1953, while said vessel was tied up to a pier owned by the defendant herein, at Staten Island, N. Y., and while plaintiff was duly performing his duties on board said vessel in a careful, proper and prudent manner, and solely by reason of the negligence of the defendant and officers and fellow seamen of the plaintiff, and the unseaworthy condition of said vessel, plaintiff was caused to suffer injuries and damages as hereinafter set forth.

Fifth: That plaintiff's injuries and damages were not caused by neglect or want of care on his part, but solely and wholly by reason of the carelessness and negligence of the defendant and officers and fellow seamen of the plaintiff, and by reason of the unseaworthy condition of said vessel and its equipment.

Sixth: That plaintiff's injuries and damages were caused by reason of the negligence and carelessness of defendant and the negligence of the officers and fellow seamen of the plaintiff and the unseaworthy condition of said vessel and its equipment and the defendant failed to provide the plaintiff with a safe, secure and proper place in which to perform his work and with proper and suitable materials, tools and appliances with which to perform his

work; and the defendant permitted the said vessel to become and remain in an unseaworthy and dangerous condition and failed to place safeguards in and about the vessel so as to conserve the life and limb of the members of the crew working in and around the said vessel and failed to take proper precautions to protect the plaintiff from suffering severe injuries and damage when he was caused to fall from a barge owned and operated by the defendant herein, while he was in the performance of his work in the aforesaid capacity of Barge Captain, as the result of negligence and the unseaworthy condition of said vessel; that on the aforesaid date while the plaintiff was so employed, the defen- [fol. 17] dant failed to properly protect the plaintiff from suffering said damages and injuries, and failed to comply with the General Admiralty Law and statutes of the United States Government and steamship rules regulating the relationship of the parties hereto and the duties owing to the plaintiff by defendant as a result of all of which plaintiff herein sustained injuries and damages hereinafter complained of.

Seventh: That by reason of the premises plaintiff suffered injuries to his head, face, body and limbs and became sick, sore, lame and disabled, all as the result of the negligence of the defendant and the negligence of the officers and fellow seamen of the plaintiff and the unseaworthy condition of the said vessel and its equipment and that as a result thereof, plaintiff was confined to a hospital where he received medical care and treatment and plaintiff has been unable to attend to his usual duties as a result of said injuries and upon information and belief, will never in the future be able to perform his work in the same manner as prior to said accident; that plaintiff's earning power will be greatly diminished thereby; that the plaintiff suffered and will continue to suffer great pain and agony from his injuries and upon information and belief, plaintiff has been permanently injured and damaged.

Eighth: That at all times hereinafter mentioned, there was and still is in full force and effect, an act of Congress binding upon the parties hereto, known as the United States Merchant Marine Act of 1920, Section 33, Act of June 5, 1920, Chap. 250, 41 Stat. at Large 1007, Title 46, U. S. C. A.

Section 688, commonly known as the "Jones Act", by virtue of which this Honorable Court has jurisdiction over the parties and the subject matter of this action.

Ninth: That by reason of the premises, plaintiff has suffered damages in the sum of One Hundred Thousand ($100,000.00) Dollars.

[fol. 18] AS AND FOR A SECOND CAUSE OF ACTION

Tenth: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "First" to "Eighth", both inclusive, with the same force and effect as if herein fully set forth at length.

Eleventh: That upon information and belief, plaintiff having become injured and ill as aforesaid, it was the duty of the defendant herein to furnish the plaintiff with prompt medical care, attention and medicines and to pay for the expenses of the plaintiff's maintenance and cure, and to pay him wages to the end of the voyage and for a time thereafter, for all of which the defendant is obligated by General Maritime Law.

Twelfth: That the defendant has failed, neglected and refused to pay to the plaintiff all of the wages, maintenance and cure hereinabove referred to in paragraph "Eleventh", while the plaintiff has been incapacitated, and upon information and belief, that the plaintiff has been and will be incapacitated for a long period of time, and as a result thereof, the sum which the defendant is obligated to pay to the plaintiff therefor, upon information and belief amounts to Ten Thousand ($10,000.00) Dollars, no part of which has been paid although duly demanded.

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred Thousand ($100,000.00) Dollars on his first cause of action and Ten Thousand ($10,000.00) Dollars on his second cause of action, making in all the total sum of One Hundred Ten Thousand ($110,000.00) Dollars together with the costs and disbursements of this action.

Bernard Rolnick, Esq., Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

[fol. 19]

IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Trial

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Lamb: If the Court please, during the picking of the jury, counsel for the plaintiffs made the comment that there was a basis, another basis, is the way he put it, of recovery; namely, the unseaworthiness of the barge Winisook.

I ask your Honor at this time to exclude any reference to unseaworthiness of the barge Winisook as the basis for recovery in this case for the reason, one, it is not pleaded, and for the second reason, and the principal reason, that this is not a diversity case, and there is no jurisdiction of this court at common law, civil jury, for a determination of a right of recovery on the basis of the maritime or admiralty doctrine of unseaworthiness, as such, without regard to negligence.

The Court: First, it has not been pleaded. What about that, Mr. Kilroe?

Mr. Kilroe: Well, Paragraph 5, general allegation of unseaworthiness, and Paragraph 6.

The Court: He mentions unseaworthiness.

Mr. Lamb: I take that to refer to the barge, Pfeifer No. 2.

The Court: The ship that you are mentioning is the second ship?

Mr. Lamb: That is right.

Counsel made reference to the Winisook, whereas he pleads as to the Pfeifer No. 2.

I take it the unseaworthiness in the complaint was related to Pfeifer No. 2 upon which it is claimed that the man was employed and a member of the crew, not some third independent vessel.

Mr. Kilroe: That is not so. This plea is brought to refer to both vessels. One of our contentions is that at the time of the accident, although he was injured on the

Winisook and was injured, he was still a member of the crew of the Pfeifer No. 2.

[fol. 20] The Court: Well, taking Paragraph 5 and the verbiage about unseaworthiness, you say, by reason of the unseaworthiness, unseaworthiness—or rather, unseaworthy condition of the vessel, and you are speaking, as I gathered, of the Pfeifer No. 2. You don't say of said vessels.

Mr. Kilroe: Well, it was conceded from the beginning, I think, this is an unlimited, rather a very strict interpretation and there was no doubt at any time that this man was injured on the Winisook.

The claim here is, and our first contention is, that when he was injured on the Winisook he was still a member of the crew of the Pfeifer No. 2. At no time in this litigation, the motions that took place here for summary judgment, was it ever contended that this man was not injured on the Winisook or was injured on the Pfeifer No. 2; so this refers to the vessel involved in the accident.

Mr. Lamb: That is my very point, your Honor, that the contention has been that the man, although injured on the Winisook was injured as a member of the crew of the Pfeifer No. 2.

In other words, he had temporarily been on the Winisook. There is or has never been any pleading here, there has never been any contention here that independently of the right of action which the plaintiff asserts under the Jones Act, as a member of the crew of the Pfeifer No. 2 against his employer that he is asserting any right of action based upon an unseaworthy condition of some third independent vessel with which the man has not been connected.

Mr. Kilroe: Absolutely, that contention has been from the beginning.

The Court: You had a motion, as I gather, for summary judgment?

Mr. Kilroe: That is right.

The Court: Was there anything in those papers?

Mr. Kilroe: Yes, sir; it says he was injured on the Winisook and he was performing a duty on the Winisook on a [fol. 21] raft, and may I point out something else, your Honor, aside from all this; our second contention is, no matter what they call him, a carpenter, engineer or a baker, or a

cook, he was on the Winisook, and whether you call him a seaman or not, under the doctrine of the Hawn case, he is entitled to recover, if there was an unseaworthy condition of the vessel; that he had to pass through there to perform his work.

Mr. Lamb: That is actually in a third-party action, under the Hawn case.

The Court: Where is the Hawn case?

Mr. Kilroe: I cited it in there.

The point is this, your Honor, that a carpenter or anyone else who is on one vessel performing any services in the same position as a longshoreman and comes under the same classification as a seamon.

The Court: Well, I will deny the motion at this time; but reserve the right to you, Mr. Lamb, to make appropriate motions later on in the case.

* * * * * * *

CHRISTIAN F. BRAEN, the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Braen, you are the plaintiff in this action?

A. Yes, sir.

Q. How old are you?

A. 53.

Q. And what was the date of your birth?

A. January 22, 1904.

Q. Now, prior to January the 22nd, 1953, you were employed by the Pfeifer Oil Transportation Company, the defendant in this case. is that correct?

A. Yes, sir.

Q. And you had been a mate on one of their vessels; is that correct?

A. Yes, sir.

[fol. 22] Q. Now, what was the name of that vessel?

A. Pfeifer No. 2.

Q. And how long had you been a mate of the Pfeifer No. 2 before your accident?

A. Some time in the late fall, around September. Around September, I would say.

Q. Now, prior to that time, had you gone to sea in different capacities, Mr. Braen?

A. Yes, sir.

Q. And at the time of your accident, did you hold any papers from the Coast Guard?

A. Yes, sir.

Q. What papers did you hold?

A. I hold the ratings of Chief Cook, Chief Steward and also as Barge, Tanker man's Certificate.

Q. Then I take it that this tanker man's certificate has to do with handling oil lines, is that right?

A. Yes, sir.

Q. Now, what were your duties on the Pfeifer No. 2?

A. My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel; it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.

We handled the hose for the loading and unloading of the cargo, which we referred to as the cargo hose; and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things like that; and minor repairs, repairs that we could handle between the two men aboard the barge.

Q. Now, the crew of the Pfeifer No. 2 consisted of how many men?

A. Three men.

Q. Did these three men remain on the barge at all times?

A. Not all three of them.

Q. What was the procedure, the method of work?

A. Well, we worked by contract with our union on an eight-hour day. In order to get time off, two men would work 12 hours a day. We would share the twenty-four hours between the two men.

One man would always be off. We worked two weeks on and one week off.

[fol. 23] Q. While you were off did you get paid anything for that time?

A. Yes, sir.

Q. What did you get paid during that time?

A. We received a bonus, monthly bonus for the handling of this cargo hose I referred to. We also received a food allotment. Both of them averaged—Now, they averaged $1.90 a day at that time. I think the cargo hose was slightly less.

We also accumulated those days the barge worked on our vacation pay.

Q. In other words, the week that you were off, you got this hose pay and what you might call ration money and accumulation for vacation, is that right?

A. Yes, sir.

Q. From the time that you started to work on the Pfeifer No. 2 up to date of this accident, had you always been a mate on that vessel—I mean, from the time you started on the Pfeifer No. 2 up to the time of your accident, had you been a mate on this vessel during that whole period?

A. Yes, sir.

Q. There came a time prior to the accident that you developed some pump trouble; is that right, on the Pfeifer No. 2?

A. Yes, sir.

Q. What pump was involved?

A. The port pump, as I recollect, sir. The port pump.

Q. How long was that before your accident, if you can recall?

A. The trouble developed no more than one or possibly two days before the accident.

* * * * * * *

Q. After you had finished pumping the load, where did your vessel go after that?

A. Well, it was necessary to repair the pump. We were ordered into the yard at West New Brighton for repairs.

Q. That is Staten Island; is that correct?

A. Yes, sir.

Q. Did the Pfeifer Oil Company have a repair dock over there, repair equipment?

A. Yes, sir.

[fol. 24] Q. Do you recall how long before January 22nd, that is, the day of your accident, that the Pfeifer No. 2 was taken over to this repair dock?

A. I don't recall the exact time of the day that we arrived there; but I do know that we worked all the preceding day or the preceding afternoon, anyway, in dismantling the pump in question.

Q. When you are speaking about preceding day, do you mean the day before your accident?

A. Yes, sir.

* * * * * * *

Q. Well, the afternoon before your accident, what work did you do?

A. We helped disassemble the pump. We took the bad part which was the propeller and shaft and we carried it across the Winisook, across the basement, which was the machine shop, and brought the new propeller and shaft down.

* * * * * * *

Q. Now, on the night before your accident, did you leave the vessel or did you stay on the vessel?

A. I stayed aboard the vessel.

Q. And did you eat on the vessel that night?

A. Yes, sir.

Q. And did you have your breakfast aboard the vessel the next morning?

A. I did.

Q. Now, the next morning when you turned to and went to work, what did you do?

A. Well, the afternoon before, it had been raining on the 21st and in working around the pump we had erected a canvas canopy, over it, so that we could work there without getting too wet, and amongst other things, the morning of the accident, I did help dismantle that canopy, just getting parts ready for the assembly of the pump.

* * * * * * *

Q. I show you this rough diagram made by you and ask you if that shows roughly the dock, the raft you spoke about,

[fol. 25] the Winisook and the Pfeifer No. 2? Roughly, does that describe the dock?

A. It does.

Mr. Kilroe: I offer that in evidence.

Mr. Lamb: No objection.

(Diagram marked Plaintiff's Exhibit No. 1 in evidence.)

* * * * * * *

Q. I show you this photograph and ask you if that is a true representation of the portion of the barge, the Winisook?

A. It doesn't show the one end, but both ends are exactly alike.

* * * * * * *

Mr. Kilroe: I offer that in evidence.

The Clerk: Photograph, Plaintiffs' Exhibit No. 2 in evidence.

(Photograph of the barge Winisook was marked Plaintiff's Exhibit No. 2 in evidence.)

* * * * * * *

Q. And I note in the center there, there is a black, a beam or davit?

A. Yes, sir.

Q. Could you tell us, how could you reach that davit?

A. There was only one way to reach it and that was by—it had small ledges, shown on that picture, by going out the doors and proceeding along that ledge to a point where the lines were secured to that center davit or a bitt.

Q. In other words, was there an entranceway from the inside of the Winisook that you could use to get out to this center davit?

A. No, sir; there was no way to reach that center davit, except by way of the rail or catwalk along the edge of the boat.

Q. Can you tell us your best estimation of the width of this catwalk or ledge that led out to this center davit on the Winisook?

A. It was no more than 12 inches.

* * * * * * *

[fol. 26] Q. Now, I notice in this photograph that there is a line running along the side; and it looks like a wire attachment above the catwalk.

A. Yes, sir.

Q. What did you call that line?

A. That would be a life line, safety line.

Q. And how far above the catwalk was this life line or safety line, a distance, your best estimate?

A. Well, it was close to four foot.

* * * * * * *

Q. Now, you have already testified that you did some work in this dismantling of the canopy on board the Pfeifer No. 2; is that correct, on the morning of the accident?

A. Yes, sir.

Q. Now, who was in charge of this operation of rebuilding this pump?

A. Well, in overall charge there was one absolute boss, that was Mr. Edward Smith, but the actual repair work was under the actual control of Mr. Steven Smith, his brother.

Q. So the man actually in charge was Steven Smith?

A. In immediate charge of that job, yes, sir.

Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something?

A. I did.

Q. And who did you receive orders from?

A. Mr. Edward Smith.

Q. And will you tell us what orders you received?

A. We had been busy for approximately an hour, and Mr. Smith determined that it was too much help on the one job, and he said, "Mr. Braen, you were formerly a carpenter," and I said, "Yes."

He said, "Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done."

Well, that was it.

Q. Now, this raft was located in the position, the raft that you are referring to, it was this raft that was between [fol. 27] the pier and the Winisook; is that right? As shown in this rough diagram of yours?

A. Yes, sir; it was between the Winisook and the dock.

* * * * * * *

A. Upon receiving the orders from Mr. Smith to finish laying this deck on the raft, I first proceeded to get the necessary hammer, nails and saw and other material up to the door that I intended to use, which was on the northwest end, I would say, northwest end door.

After getting the material there, I proceeded out along this raft with intentions of releasing a line from the bitt, in order to pull the raft up opposite the door where I could secure it, put a ladder down to it, and put the material down and finish the job.

Q. Now, did you proceed out on the catwalk in furtherance of this plan of yours?

A. I did.

Q. Did you ultimately reach this davit, the line that was attached to the raft?

A. Yes.

Q. Will you tell us what you did when you arrived at the davit?

A. Well, there was one of two things that I could do: Either I could attempt to untie the knots, or attempt to slide the knots back along the line so that it would enlarge the loop so that I could lift that off the bitt.

Q. Well, what did you do? Which method did you select. What did you do?

A. As I had to work mostly with one hand, I was attempting to slide the knots back along the line.

Q. As you were doing this, would you describe to his Honor and the jury the position that you took, the position of your feet, the position of your body as you were carrying on this operation of sliding the knots back as you described?

A. I went up to the edge of the opening, just in front of the bitt. My left foot was against the inboard side of the barge; my right foot was about a foot or a foot and a [fol. 28] half ahead of my left foot and on the outside edge of the barge.

I was in a deep crouched position working on this line. (indicating).

Q. Now, which hand, if you can recall, which hand were you using working on the line, and what was the position of your other hand?

A. I was attempting to hold onto this wire cable that was before mentioned, about four foot above the deck and was working with my right hand on the line.

Q. And as you were working in that position, did something happen to you?

A. Yes, sir.

Q. What happened?

A. I felt a rolling, slipping sensation under my right foot, something apparently gave way. It caused my foot to slide inboard, throwing the weight of my body away from the barge and into the direction of the water.

Mr. Lamb: I move to strike out apparently something gave way, as a conclusion.

The Witness: Something did give way.

The Court: All right. You say something did give way?

The Witness: Yes.

Q. You say that your right foot slipped inboard, that would be toward the side of the Winisook; is that right?

A. Yes, sir.

Q. And as you were in this position, so we will make sure that we know where you were standing, which position was your right side facing, the right of your body, facing?

A. My right side would be on the outboard side.

Q. When you say outboard side, what do you mean? Is that the water side?

A. That is the water side, yes, sir.

Q. When you say inboard, you mean in toward the side of the Winisook; is that right?

A. Yes, sir.

[fol. 29] Q. Now, you have told us your foot slipped, your right foot slipped or slid in and then what happened to you?

A. It threw the weight of my whole body outboard or out over the water, the wire being so high and out of reach I had nothing to grasp.

I simply had nothing to prevent myself from falling.

Q. And did you fall?

A. I did.

Q. Where did you fall?

A. I fell directly onto the raft which was then directly below me.

• • • • • • •

Q. And could you tell us what the weather conditions were on the day of this accident?

A. Yes, sir; it had been raining the day before, but was not raining at the time of the accident. It was damp, and as I remember, very little wind, at least in that location.

Q. Well—

A. But it was wet.

Q. As you walked along this catwalk of the Winisook, was there any movement of the Winisook due to the tide or waves or any other condition that you could notice?

A. None that I noticed, sir.

Q. The Winisook was anchored in the water, was it not?

A. The Winisook was tied to the dock.

Q. Yes; but in the water?

A. In the water.

• • • • • • •

Cross examination.

By Mr. Lamb:

• • • • • • •

Q. So you were still up until 1953, a trained and capable carpenter, weren't you?

A. Oh, yes.

• • • • • • •

Q. Let's go back to the time before your accident, Mr. Braen.

You had been working on the Pfeifer 2, and then she was sent into the yard over there for Pfeifer?

A. Yes.

Q. At West New Brighton?

A. Yes, sir.

[fol. 30] Q. And that is a place that was used at that time by Pfeifer for tying up and making repairs of a minor character to their vessels, wasn't it?

A. Yes, sir.

Q. That is what it was used for exclusively, wasn't it?

A. No, sir.

Q. What else was it used for?

A. It was also used for tying up the barges on week-ends; by week-ends, I mean Saturdays and Sundays.

Q. Thank you for the correction. You are quite right. It is used occasionally just to lay up the boats that are not to be in use?

A. Yes, sir.

Q. And normally that might be a week-end; sometimes it is for longer than that, right?

A. Very seldom for longer than that, sir.

Q. Very well.

In any event, it was used for a tie-up place or else for doing some minor repair on a boat?

A. Major repairs.

Q. You call them major? I call them minor; there was no drydock there, was there?

A. All right, sir, I will allow that.

Q. All right.

There was no drydock there, was there?

A. No, sir.

Q. You couldn't do any bottom repairs there?

A. Yes, sir.

Q. On the bottom of the water?

A. Yes, sir. You could through the tanks on the bottom; this raft was under there, and the welder could weld the side.

Q. You never participated in doing any of that, had you?

A. Naturally we would, because there had to be somebody stationed at all times on the deck so that if a boat came along there would—that would cause that barge to rock, and the welder had to be notified to get out of there or he would be crushed.

Q. So that you participated sometimes in helping out with these repairs that you call major repairs?

A. Yes, sir.

[fol. 31] Q. And at other times when the boats ran over there would you help with other types of repair work?

A. Now, I don't know just what you mean by that.

Q. I meant, were there times when you worked up on the land doing something in connection with this, some repair work?

A. Yes; we were called on to go on land.

Q. As a matter of fact, when the boats were over there your work varied considerably depending on what they had to do, what had to be done around that place?

A. Yes.

Q. Sometimes you would be working on land; sometimes you would be down on the Wimisook; sometimes you would be down on a barge; sometimes you might be up in the shop?

A. Wherever we were ordered to go, we went.

* * * * * * *

Q. So, during the normal working hours of the day of the 21st, the Pfeifer No. 2 was tied up, wasn't she?

A. Yes, sir.

Q. And you worked around there on the 21st?

A. Might I add something there? The normal working hours aboard a barge go over a 24-day period.

Q. You first said yes to the question that I asked you, didn't you?

A. Yes, sir.

Q. There are different working hours for men that are working at the plant or on shore down there, aren't there?

A. Yes; there are.

Q. And those working hours are what?

A. Normally eight hours a day.

Q. Eight to four?

A. Yes, sir.

Q. And on the 21st, you worked from eight to four, did you not?

A. On the 21st?

Q. That is right.

A. Yes, sir.

Q. And that was the normal working hours at the plant?

A. I wouldn't say that I didn't put in more than just eight to four. I might have worked earlier in the morning in tying up that boat, sir.

[fol. 32] Q. I am talking about during the day light hours.

A. During the day light hours, I did work from eight to four.

Q. Those are plant working hours, not boat working hours?

A. I never knew there was any difference between boat working hours and plant working hours.

As long as I worked for Pfeifer Oil I never knew this. There was never any change in our pay checks or any nature by which we would know that.

Q. Didn't you just tell us that eight to four were not the normal working hours, that you worked twenty-four hours a day?

A. It was only our hours that were changed.

Q. You only worked from eight to four on the 21st; didn't you?

A. That is right.

Q. Now, on the 22nd, you turned to again at eight o'clock in the morning?

A. Yes, sir.

Q. That is, you started working at eight o'clock?

A. Yes, sir.

Q. And you intended to work only until four o'clock that day; is that right?

A. Unless the boat went out prior to that.

Q. Unless the boat went out prior?

A. Yes, sir.

• • • • • • •

Q. Now, on the 22nd,—correct that. I will come back to the 21st for a minute.

Referring again to this deposition, or this time that you testified formerly in this case in January of 1954, do you remember being asked this question and making this answer on page 10, referring now to the 21st of January:

"Q. How long did you continue at work on this job on that day?

"A. Until I should say about four o'clock on that afternoon, the customary quitting time for repair men."

A. This is referring to the 21st?

Q. That is right.

A. That is right.

[fol. 33] Q. Now, on the 22nd, you started at eight o'clock, and then you said that the first thing that you did on the 22nd, if I understood you, was to get some parts in connection—

A. We did get some parts.

Q. When you say we, who are you referring to?

A. Myself and Captain Hull.

Q. Well, what kind of parts were they?

A. Parts having to do with the repair of the pump.

Q. You don't know anything more then about them than just that?

A. Well, I would probably know what parts they were and where they fitted; but I couldn't properly call them by name.

Q. You are not really a machinist or a mechanic, are you?

A. I wouldn't say that I could qualify as that, sir. No, sir.

Q. And the work that you were doing insofar as bringing any parts to the vessel, that was, I think as you previously described it in this deposition, just muscle work?

A. Not necessarily. Captain Hull and I did partially take the pump apart and have it all ready for them to go to work on. We did that in transit on the way over to the yard.

Q. I am talking now about down at the yard, in the yard, on the morning of the 22nd. These parts that you got, that you and Captain Hull got?

A. Yes, sir.

Q. What you did was simply carry these parts on this pallet or stretcher, wasn't it? You lifted the stretcher?

A. That was not done on the 22nd; that was done on the 21st. The heavy parts on the pallet.

Q. Do you remember being asked this question—being asked these questions and making these answers on page 12:

"Q. I think you told me on the morning of the 22nd you turned to again to work on this pump?

"A. That is right, sir.

"Q. What did you do to start, the first thing?

"A. The first thing was to get the necessary repair parts from the Winisook on the deck of the Pfeifer No. 2.

[fol. 34] "Q. What means were you using for taking the parts to the Pfeifer No. 2?

"A. Well, we had sort of a stretcher, and you carry the extra parts on that stretcher. And mostly I was doing muscle work, holding up one end of the stretcher."

A. Yes, but then the parts had already been carried from the machine shop down to the Winisook; then they were on the deck of the Winisook.

Q. The day previously you had helped carry them from the machine shop down to the deck of the Winisook; so on the morning of the 22nd, you merely helped to carry them from the deck of the Winisook to the deck of the barge?

A. Yes, sir.

"Q. How long did you continue doing that job?

"A. I would say approximately one-half hour."

A. It might have been a little more than that, but I would say that that would qualify it.

Q. Certainly you don't dispute that you so testified?

A. Yes, that is right, that is all right.

Q. And your recollection was much better then?

A. Yes.

Q. And then do you remember being asked this question and making this answer:

"Q. Then what did you do?

"A. Then I was given orders to see about putting a deck on this raft."

A. Yes.

Q. Do you remember so testifying?

A. Yes.

"Q. What time would you say that was about?

"A. Well, it was about half-past eight or shortly after."

[fol. 35] Do you remember so testifying?

A. I would say that that is right, yes.

"Q. Who gave you those orders?

"A. Mr. Smith; of course, my captain, Captain Hull was present also."

A. That is right, Mr. Hull was present aboard the boat.

Q. But you—he had nothing to do with giving you those orders?

A. No, sir.
Q. It was Mr. Edward Smith who gave you those orders?
A. That is right.
Q. Mr. Edward Smith was not the captain of the barge?
A. No, sir.
Q. He had no connection with the barge in any capacity?
A. Oh, yes, sir.
Q. I said in any capacity relating to the barge?
A. Yes, sir.
Q. Was he a mate?
A. No, sir; he was our absolute boss.
Q. He was a boss over all of the men?
A. Over the entire fleet.
Q. But he wasn't connected with any particular vessel?
A. He was connected with all of them, sir.
Q. That is right; connected with all.
He was located ashore, wasn't he?
A. Well, he gave me my orders on the deck of the barge.
Q. But, Mr. Smith didn't ordinarily travel on the barge Pfeifer No. 2?
A. No, sir.
Q. He didn't travel on any particular barge in any capacity at that particular time?
A. Not generally.
Q. So that he was a shore-side manager, wasn't he?
A. A what?
Q. A shore side manager? Haven't you heard of that expression?
A. Yes, sir.
[fol. 36] Q. Now, do you remember being asked this question and making this answer:

"Q. What were you told to do?
"A. I was merely told to put the plank decking, to finish the plank decking on the raft."

A. Yes.
Q. Do you remember so testifying?
A. Well, if it is there, I must have testified to that.
Q. That was correct, wasn't it?
A. Yes, insofar as it went; yes, sir.
Q. Do you mean to say that there is something omitted from it?

A. I would say there was.

Q. I can read it to you again:

"Q. What were you told to do?

"A. I was merely told to put the plank decking, to finish the plank decking on the raft."

Would you say that that is correct or not?

A. Well, I don't recall having used the word, "merely," but insofar as it goes, that statement is correct.

Q. Now, this Winisook, that was what you knew down there at the plant as a repair barge, didn't you?

A. Yes, sir.

Q. That Winisook, it didn't carry cargoes around the harbor, did she?

A. No.

Q. As a matter of fact, as long as you had worked for Pfeifer prior to your injury, she had always been at the yard?

A. It had always been at the yard, yes, sir.

Q. And she was used for storing parts and she also had some equipment on board that could be used for making repairs, didn't she?

A. Yes, sir.

Q. She is what is frequently termed a work barge or repair barge?

A. Yes, sir.

Q. She was permanently made fast to a dock down there?

A. Permanently, no, sir.

[fol. 37] Q. When I say permanently, I meant she was secured by lines that were made fast to the dock?

A. A line is not of a permanent nature.

Q. I didn't mean that she was riveted or anything like that; but she wasn't moved out of there during the time that you worked for Pfeifer?

A. By our of there, what do you mean?

Q. I meant out of the yard.

A. Out of the yard, no, sir.

Q. So when you are suggesting that it was not permanent, what you mean, it could be shifted back and forth?

A. Or turned around.

Q. Or turned around as it might be necessary or convenient in connection with some repair job down there?

A. Yes, sir.

Q. But also still serving the function of a repair barge; right?

A. Yes, sir.

* * * * * * *

Q. I show you this photograph and I will ask you if, when the door of the barge is open you can see in that photograph the planking that extended from the Winisook across to the deck?

A. I can.

Q. And is that the type of planking that was there at that time?

A. Not always; they changed quite often.

Q. Was it of that general type?

A. Of that general type, yes, sir.

Q. Was its location the same as the location indicated in that photograph?

A. Not always, no, sir.

Q. Well, I am talking about the time of the accident.

A. At the time of the accident, I would say that that was approximately the location.

Mr. Lamb: May I offer this in evidence?

Mr. Kilroe: No objection.

(Photograph marked Defendants' Exhibit A in evidence.)

* * * * * * *

[fol. 38] Q. Now, I show you another photograph, Mr. Braen, and ask you if you can identify that photograph as showing approximately the entire side of the Winisook that would be toward the raft showing both doors open and showing the recess in which the bitt is located?

Does it show that?

A. It does.

Q. And that would be the side which you were walking on, the side where the accident occurred?

A. It would.

Mr. Lamb: I offer that in evidence.

* * * * * * *

The Clerk: Photograph marked Defendants' Exhibit B in evidence.

* * * * * * *

Q. Now, this deck that you were to put on the raft, it was in process of being built at the time you were told by Mr. Smith to do that work, wasn't it?

A. The raft?

Q. The deck on the raft, it was partly finished?

A. The raft had been in existence for a long time.

Q. The decking, you understand me?

A. The decking, yes.

Q. The decking was partly finished, wasn't it?

A. Yes, sir.

Q. What he wanted you to do was to finish that decking?

A. Yes, sir.

* * * * * * *

Q. Will you just put a little X on the diagram at the point of the door where you came out the door?

A. Yes.

Q. Now, you put an X on the diagram at this point?

A. Yes, sir.

Q. So that you were proceeding then, this way toward the side or end, I should say, toward the end of the Wini sook where the platform ran across from the door toward the dock?

A. Yes, sir.

Q. You had gotten to the point where the bitt was located, and where there was this line that you said you were [fol. 39] going to attempt to get off the bitt in order to shift the raft?

A. Yes, sir.

Q. You had gotten to that point?

A. Yes, sir.

Q. As I understood your testimony yesterday, you said that as you were attempting to slip the knots on the line something gave way?

A. Yes, sir.

Q. And your right foot went out from under you?

A. It slid inboard, yes, sir.

Q. Now, I want to make certain that we are not misunderstanding your testimony.

You said that your—something gave way under your foot, is that right?

A. Yes, sir.

Q. That is what you meant to indicate?
A. Yes, sir.

* * * * * * *

Q. Did you tell him at that time none of the barge's equipment broke to cause my accident?
A. I do not recall.
Q. Did any of the barge equipment break?
A. I would say, something gave way, so something must have broken.
Q. What do you mean, something gave way? You have indicated that your foot slipped in toward the barge. I am asking you, Mr. Braen, did you not tell this man at that time that none of the barge equipment broke?
A. I may have. I don't recall.
Q. And at that time, so far as you know, none of the barge equipment had broken, had it?
A. I couldn't say, sir.
Q. So your statement,—you are not saying today that any of the barge's equipment broke?
A. I would say there had to be a cause for my feet slipping, yes, sir.
Q. Do I take it, then, that you don't know what the cause was?
A. It was more or less on presumption on my part, something did give way beneath my foot.
Q. As a matter of fact, you had never told anybody up to the time that you testified in this court room that some-
[fol. 40] thing gave way on that barge, had you?
A. I don't believe I did; no, sir.
Q. You don't believe you did?
A. No.

* * * * * * *

Q. As a matter of fact, on your testimony, when you testified in January of 1954, you didn't say anything about anything giving way, did you?
A. I don't believe so, no, sir.
Q. As a matter of fact, isn't this what you testified to in your examination in 1954, this is page fifteen and sixteen:

"Let me ask you first, as you were going from this end of the Winisook to the middle, were you carrying anything?
"A. No, I had nothing in my hands."

Do you remember so testifying?

A. Yes.

"Q. All right. Then what did you do?

"A. When I reached that opening it was necessary for me to bend over. The rope was over a stanchion that was about two feet high; they are made permanent so that we can throw a rope, and sort of lasso them as we approach, but naturally this rope, if it was low tide, lay right on the surface, so that it was necessary for me to bend way down in order to get that rope up. And it was just as I was reaching for this rope that my left foot gave way and I slipped."

A. My left foot?

Q. "—gave way and I slipped."

A. If I said that, it was purely a mistake at that time. It was my right foot that gave way.

Q. So far as the rest of what I read to you is concerned, do you agree that that is what you said?

A. That my foot slipped, yes, sir.

[fol. 41] Q. You did not say anything at that time about anything giving away, did you?

A. No, I did not.

Q. Now, Mr. Braen, do you remember that there came a time during the course of this lawsuit when a certain motion was made in this court and you made an affidavit in the office of your attorney, who was then representing you as counsel, which you signed and swore to, signed and swore to?

A. Yes, sir.

Q. Do you remember that that was on the sixth day of September, 1955?

A. I don't know the date, but if that is the date, it is.

Q. I show you this paper which has been taken from the file of the court in this case, and ask you if that is your signature at the end of that paper?

A. That is my signature.

Mr. Lamb: May I have that marked?

The Court: We will deem it marked as Exhibit D.

(Paper deemed marked as Defendants' Exhibit D for identification.)

Q. Now, Mr. Braen, will you look at the top of page three of this affidavit, the first sentence, beginning on that page, and read it, please?

A. While I was attempting to—

Mr. Lamb: Read it to yourself, please.

Q. Does that refresh your recollection as to what you then swore to under oath?

A. Yes, sir.

Q. Did you not then say under oath, while I was attempting to untie the raft from the repair barge, I slipped from a ledge upon which I was standing and fell, thereby sustaining serious injuries which have left me partially disabled?

A. That is true.

Q. Now, in this affidavit, again, you did not state, did you, that anything on the barge gave way?

A. That is correct.

[fol. 42] Q. Up until the time that you testified here in court, you never assigned any other reason for your fall, except that you slipped?

A. That is correct.

Mr. Lamb: I move to strike out the testimony that something gave way, your Honor.

The Court: Overruled.

* * * * * * *

Lester Hull, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Hull, on January 22, 1953, who were you employed by?

A. The Pfeifer Oil Transportation Company.

Q. And how long had you been employed by that company prior to January 22nd, 1953?

A. Oh, in the neighborhood of seven years.

Q. And on January 22nd, 1953, what was your title, sir?

A. I was captain of the Pfeifer No. 2.

* * * * * * *

Q. Now, at that time, you were a captain. What were the duties that you—I will withdraw that.

How long had Mr. Braen been on your boat, the Pfeifer No. 2, before this accident, if you can recall that?

A. Well, he wasn't with us too long at that time. I would say maybe four months or so.

Q. And what duties—what duties did he perform on the Pfeifer No. 2?

A. Well, we both performed the same duties being there are only two of us on the boat. They consist of handling lines, turning on the lights; we do our own cooking and pump the boat and load it, the cargo on it; and we do repair, minor repair jobs which are small that we can handle ourselves.

* * * * * * *

[fol. 43] Q. Can you tell us whether during those seven years prior to January 22nd, then, whether this Winisook was left in the same position or whether it was changed?

A. No.

Q. At any time?

A. No; it was turned around twice, as far as I can recall. It was turned around, end for end.

Q. And was the Winisook a permanent part of the dock? What was its location with reference to that?

A. No; she was floating. She had lines to the dock.

Q. Now, on your Pfeifer No. 2, Captain, prior to January 22nd, who made up the payroll?

A. I did most of the time.

Q. And at any time up to from the time Mr. Braen went on your Pfeifer No. 2 up until the time of the accident, was he ever taken off your payroll and put on the shore payroll?

A. Not that I know of, no.

Q. And there were times, were there not, Captain, when your ship would be laid up, when you and someone else might do some repair work on shore, is that right?

A. Yes.

Q. And during those times, would you be taken off that—off the ship payroll and put on the shore payroll?

A. No; it all depends on how long we were going to be in the yard for. We wouldn't be actually taken off. The

payroll would go in under the barge's name, but there would be no difference in the pay or anything to that effect.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. You didn't really make up these payrolls, yourself; did you, Mr. Hull?

A. Well—

Q. You only turned in the names of the men who were on the boat a particular day?

A. I put the hours down for them.

Q. And the hours that they were on board?

A. That is right.

[fol. 44] Q. You didn't really make up the payroll?

A. Not actually make up the payroll.

Q. You didn't compute the payroll?

A. I just sent the men's name in and who was on the boat, and how much they were supposed to get.

Q. Did you send in how much they were supposed to get?

A. Well, grub money, one dollar ninety cents a day.

Q. All right.

Did you compute the amount of money that the man was supposed to get for the number of hours that he worked on the particular boat?

A. The office has already done that. They have a secretary that makes that up themselves.

Q. All I am trying to find out is exactly what you did in connection with the payroll. I believe you testified on direct examination that you made up the payroll.

Now, you didn't actually make up the payroll of any of these men, did you?

A. Not make up the payroll, no.

Q. What you did, you turned into the office the names of the men, including your own, who were on the barge as of a particular day?

A. That is right.

Q. And the number of hours that they worked that day, and in case there was any overtime involved, you would put that in, right?

A. Yes.

Q. Is that correct?

A. Yes.

Q. You said something about the grub money. What would you do, indicate whether the man was on for two meals or three meals?

A. You put all three names on the payroll. The two men that is working on the boat, you put the hours that they worked in. The other men you put just one dollar ninety cents subsistence.

Q. So what you would do in making up the payroll is that you would take the three names of these men who were supposed to be assigned to that boat?

A. Right.

Q. And you would indicate which of the, you would indicate which two of the three was on board, and then the [fol. 45] fellow who was not on board, you would indicate that he was entitled to his subsistence money because he wasn't on board and therefore wasn't entitled to any wages, is that right?

A. Yes.

Q. That is all you did?

A. That is all.

Q. And what the office did, with those records afterwards, you don't know, do you?

A. I know what they done with them. They totaled them up.

Q. Do you know what they assigned any of that pay to, what assignment they made of that pay on their office records afterwards?

The Court: Did you actually see the payroll after that was made up in the office?

The Witness: No, sir.

* * * * * * *

Q. During that five-year period from the time that you first recall the barge being there, up until the time of the accident, it had never been moved away from the plant, there, the yard there, had it?

A. Never been out, no.

Q. Never been out of the yard?

A. No, sir.

Q. Now, the only movement of that barge that ever took place, that you know about, is that the barge had been turned around, end on end, so that one side, which had formerly been toward the dock was turned the other way and the other side was put toward the dock?

A. Yes.

Q. That you only recall occurring twice; is that all?

A. That is all. It didn't happen very often.

Q. The barge was stationed down there as a permanent work barge as a fixture of the repair plant, wasn't it?

A. Yes, sir.

Q. And she was, you say, she was made fast to the dock?

A. Yes, sir.

* * * * * * *

Q. Now, besides those three lines you said there were also two cables?

A. Yes, sir.

[fol. 46] Q. And I gather that the cables ran from the outside corners, that would be this corner of the barge, and that corner of the barge, and by cables, you meant steel cables, didn't you?

A. Yes.

Q. And they were secured to two wrecks?

A. Yes; they had two sunken wrecks, in there, and at low tide, you could see these wrecks, and that is when they must have made these cables fast to them.

Q. So that that was sort of a permanent mooring. It would be quite a bit of a job to unmoor her, wouldn't it?

A. It would be a job, but it could be done.

Q. But the way she was made fast indicated to you as a boatswain that it was intended that she should remain there?

A. Oh, yes.

Q. She wasn't made fast the way a boat was made fast to a dock if she was intended to be moved out again?

A. No.

* * * * * * *

Mr. Kilroe: The plaintiff rests, your Honor.
The Court: All right.

MOTION TO DISMISS

Mr. Lamb: The defendant moves to dismiss the complaint on the ground:

1. That the plaintiff has failed to make out a claim for which relief can be granted under the Jones Act which is pleaded in its complaint as the basis for his cause of action.

The contention that the defendant makes in that connection is that the testimony of the plaintiff shows that he was employed at the time that his injury was sustained to complete the placing of a decking on a raft alongside of a work barge, and that his injury was sustained while attempting to go along the work barge to a point on the work barge where he intended to shift a line from the work barge to the raft in order to put the raft in a position under one of the doors of the work barge; that the evidence clearly shows, [fol. 47] without contradiction, that that work was not work performed as a member or officer of the crew of the barge, and, number two, or of any vessel which was in navigation; that under the Longshoremen's and Harbor Worker's Compensation Act, the exclusive remedy against an employer for a maritime injury is the Longshoremen's and Harbor Worker's Compensation Act, unless the injured man was at the time an officer or member or crew of the vessel, and the plaintiff's testimony shows that he was not at the time that he sustained his injury working as an officer or member of a crew of a vessel.

We further move to dismiss the complaint upon the ground that no other claim upon which relief can be granted can be established by the evidence.

The only other basis asserted as a claim upon which relief can be granted is an alleged unseaworthy condition of the barge Winisook.

The evidence shows that the plaintiff was never employed in any wise as an officer or member of the crew of the Winisook.

We further contend that so far as any other claim for unseaworthiness without fault is concerned, that apart from

the fact that such a claim has not been pleaded, that such a claim could not be the basis for a recovery in this lawsuit, because a claim for relief on that ground is an admiralty cause of action, and a remedy can be had for that only at common law under the saving to suitor clause whereby relief would have to be had in the State Court or in the Federal Court where diversity would be the ground of jurisdiction, and there is no diversity proved in the present case.

Further, again, even if the claim were based upon an alleged condition of the barge Winisook again the man's sole remedy against his employer whom he is suing would [fol. 48] be under the Longshoremen's and Harbor Worker's Compensation Act, because the man has not been shown to be an officer or member of the crew of the barge Winisook.

The Court: I am still going to examine those cases that you submitted.

Your motion involves somewhat of a situation that was discussed at the outset of the case.

Mr. Lamb: That is correct.

The Court: Having reserved decision previously and having had no opportunity to examine those cases which I will before the termination of the whole case, I will reserve decision on that.

* * * * * * *

Edward J. Smith, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Smith, in January, 1953, were you connected with the Pfeifer Oil Transportation Company?

A. Yes, sir.

Q. In what capacity?

A. I was vice president.

Q. Where were you located? Where was your office?

A. 1595 Richmond Terrace, West Brighton, Staten Island.

* * * * * * *

Q. What did you maintain at 1595 Richmond Terrace?

A. A repair yard and a small dispatch work job was done there.

Q. What was the business of the Pfeifer Oil Transportation Company in January of 1953?

A. Transporting of petroleum products.

Q. In that connection you operated what kind of equipment?

A. Barges and tow boats.

* * * * * * *

[fol. 49] Q. How long had you maintained this yard at 1595 Richmond Terrace?

A. We opened up there in 1945.

Q. In January, 1953, can you tell me what equipment there was at that yard that was located in the water?

A. Well, I can't tell you all, but I knew that there was at least two or three barges there. There was the repair barge, the Winisook, and the oil barge, Pfeifer No. 2, and I think there was another oil barge there.

Q. Pfeifer No. 2 was a barge used to carry oil products?

A. Yes, sir.

Q. If there was another barge there, that also would have been a barge used to carry oil products?

A. Yes, sir.

Q. I meant as part of the plant at 1595 Richmond Terrace, what did you have there in the way of equipment for working on your fleet?

A. We had a covered lighter or a covered barge with some welding equipment on it, and a few other pieces of machinery.

Q. Was that the Winisook?

A. That was the barge, Winisook; yes.

Q. Did you have anything else there besides that Winisook that you used at times for repair work on your equipment?

A. The only thing that we had besides that was a raft.

Q. Upland on shore did you also have any equipment there for the making of repairs on your equipment?

A. We had a little machine shop in the basement of the office building.

Q. Now, coming down to January 22, 1953, that is the day that Mr. Braen sustained an injury down at the yard—you did mention already that the Pfeifer No. 2 was at the yard that day?

A. Yes, sir.

* * * * * * *

Q. On the morning of January 22nd, 1953, did you have occasion to talk to Mr. Braen?

A. Yes.

Q. Will you tell us the circumstances that surrounded your talking to him on that morning?

[fol. 50] A. Well, it was usually my custom to go down aboard the barge any time between 7:30 to nine o'clock and discuss the repairs and so forth with my brother.

Q. Your brother is—

A. Stephan Smith—Stephan L. Smith.

Q. He is in court here?

A. Yes, sir; can I elaborate on that?

Q. Yes. Sure.

A. My brother had charge of all of the repairs and we usually discussed what we were going to do.

On this particular morning, in view of the fact that we had no further cargo for this vessel, Pfeifer No. 2, I had to lay men off; so I went down aboard the barge, and I said, Braen, I have to lay you off. I said to him, in the meantime, can you do any carpentry?

He said, yes.

I said, do you want to finish the deck on that raft that we were building?

I said, it would be one or two days' work.

Q. What answer did he give you?

A. He said yes.

Q. About what time of the day would you say that was?

A. Well, I would say that that was between 7:30 and 8:00 o'clock.

Q. All right.

Now, what did Braen do after you spoke to him? Did he go any place?

A. He left me, and I don't know where he went. I think he went inside the barge.

Q. Which barge?
A. The Winisook.
Q. Did you see him later, inside the Winisook?
A. No, I did not.
Q. Now, did you subsequently see him?
A. Yes.
Q. Where did you see him?
A. When I saw him I said—well, I would say about five minutes later he was down on the raft. He was sitting on the raft. His back was facing towards me and he had one hand on the line, they call it the spring line, but it wasn't a spring line, it was just a line.
[fol. 51] He had one hand on the line, and he was sitting up. I think he had his left leg in this fashion (indicating), but this other leg, I couldn't see. He was partly sitting on that leg, I would say.

* * * * * * *

Q. Coming back to this barge Winisook, how long had you had that barge down at the yard?
A. We purchased that barge in 1950.
Q. What did you do with it after you purchased it?
A. We moored it to the dock.
Q. Where?
A. At 1595 Richmond Terrace.

* * * * * * *

Q. During the time that that barge was there, had it been used for any purpose at all, other than merely as a work barge in connection with repair work?
A. No; other than there was a few items stored there, some tackle, rope, ladders.
Q. Well, then, let me put it to you this way: Had it ever been used for any purpose other than storage and repair?
A. No, sir.
Q. Now, this raft that you spoke about, you said something about asking Mr. Braen if he had been—
A. Could do any carpentry work.
Q. And to complete a deck on the raft?
A. Yes, sir.

Q. Had there been some part of the deck already laid there?

A. I would say three-quarters of it was laid already.

Q. When you spoke to him about laying the balance of the deck, that raft deck, can you recall precisely what were your exact words of your conversation?

A. No, sir; I cannot.

Q. But you indicated before, substantially, it was whether or not he could complete the deck?

A. Yes, sir.

Q. Now, tell me this: Did you at that time, Mr. Smith, say to Mr. Braen that you wanted to complete that raft in [fol. 52] order to use it for any work on the Pfeifer No. 2?

A. No, sir; absolutely not.

Q. Did you have any use for that raft in connection with doing any work on the Pfeifer No. 2?

A. Not at that time.

Q. Did you contemplate using that raft in connection with any work on the Pfeifer No. 2?

A. Not at that time.

* * * * * * *

Mr. Stephan Smith, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Smith, were you employed by Pfeifer Oil Transportation Company in January of 1953?

A. Yes, sir.

Q. How long had you been employed by Pfeifer Oil Transportation Company before January 22nd, 1953?

A. Fifteen years.

Q. In what capacity were you employed on January 22nd, 1953?

A. As a mechanic.

Q. And how long had you been a mechanic before that for that company?

A. Approximately six years.

* * * * * * *

Q. Now, as a mechanic for Pfeifer Oil, during the period that you have worked as a mechanic, prior to January 22nd, 1953, what particular work came under your supervision? What kind of work did you do?

A. Repair the pumps, the motors.

Q. Now, in connection with repairing the pumps and motors, would that be pumps and motors?

A. Both.

Q. On both boats and barges?

A. Yes.

Q. Were you in charge of that work or was there somebody else who was your superior?

A. I was in charge.

* * * * * * *

[fol. 53] Q. Now, on January 21, 1953, you remember that there was an injury to a man by the name of Christian Braen that happened over there at the yard?

A. Yes, sir.

Q. Prior to that accident happening, do you remember that there was a covered barge over there at the yard known as the Winisook?

A. Yes, sir.

Q. Now, tell us when you first became acquainted with the Winisook?

A. I believe that it was in '49.

Q. How did you become acquainted with it?

A. I set up the machinery into it.

Q. What?

A. I set up the machinery, to do the repair work.

Q. Now, where was she at that time?

A. West Brighton, Staten Island.

Q. At your yard?

A. Yes, sir.

Q Was that right after you had bought her?

A. Yes, sir.

Q. You said you set up the machinery in her. What kind of machinery?

A. Drill press, welding machine, air compressor.

Q. What kind of work is that machinery used for?

A. For work on the barges.

Q. What was the Winisook used for from that time up to January 22, 1953?

A. Repairing the oil barges and the tugs.

Q. Did she ever leave the yard from the time that she first came down there?

A. No, sir.

Q. How was she moored?

A. By three lines and two cables.

* * * * * * *

Q. During the time that she was there, that you were there at the yard, and while the Winisook was there, was she ever used for any other purpose other than for storing equipment and other repair work?

A. No, sir.

Q. Now, in January, 1953, coming down to the date of January 22nd, was there any raft at the yard?

A. Yes, sir.

[fol. 54] Q. What was the condition of that raft in respect to whether or not it was completed insofar as decking was concerned on the morning of January 22nd, 1953?

A. I would say that it was approximately, practically three-quarters completed.

Q. There was still some decking to be laid on it?

A. Yes, sir.

Q. Do you remember the Pfeifer No. 2 coming into the yard around about this time in January of 1953?

A. Yes, sir.

Q. Can you tell us when she came into the yard?

A. I believe it was, my recollection was about three o'clock in the afternoon.

Q. Of January what?

A. Of January 22nd.

Q. The same day that Braen was injured?

A. No, the day before.

Q. The day before?

A. Yes.

Q. In connection with that barge, after she came into the yard, did you have anything to do with her?

A. Oh, yes.

Q. Tell us what you had to do with her?

A. Well, some times when they have a minor repair, I go to whatever port she is at.

Q. I am talking now when she came into the yard on January 21, 1953, that particular instance. Did you have anything to do with her?

A. Yes.

Q. What did you have to do with her?

A. I went aboard her and inspected the port pump.

Q. And you found that there was something to be done on the port pump?

A. Yes, sir.

Q. Now, on the afternoon of January 21, did you do anything with respect to that port pump?

A. That is the preceding day.

Q. The preceding day, is that right?

A. Yes; I dismantled it.

Q. In doing that work, did you have any assistance?

A. Yes, sir.

[fol. 55] Q. Who helped you?

A. Mr. Donoway, Mr. Braen and Mr. Hull.

Q. What time did you quit work that day?

A. Four-thirty.

Q. Now, on the next morning, January 22nd, what did you do, if anything, with respect to the Pfeifer No. 2?

A. Pfeifer, No. 2, we re-assembled the pump.

Q. Who do you mean by we?

A. Mr. Donoway, myself and Mr. Hull.

Q. You didn't make any mention of Mr. Braen this time?

A. That is right.

Q. Had Mr. Braen been assigned to do anything else that day?

A. Yes, sir.

Q. Tell us what it was.

A. Mr. Smith, my brother, Ed Smith and I have a conversation every morning on what work we are going to do.

* * * * * * *

Q. As a result of that conversation, did anybody give any orders to Mr. Braen?

A. Yes, sir.

Q. Who gave the orders to him?

A. Mr. Ed Smith.

Q. Were they given to him in your presence?

A. Yes, sir.

Q. Tell us what orders you heard him give to Mr. Braen?

A. He ordered Mr. Braen to re-deck the raft.

Q. And about what time of the day was that?

A. I would say about eight-thirty.

Q. Now, did you see Mr. Braen after that?

A. Yes, sir.

Q. And tell us, if you will, please, in your own words, in your own way, just where you saw him and what you saw him doing, and what happened?

A. Well, after that he walked down into the Winisook where we stored some lumber and he got several pieces out. He got the tools, and that is the last I seen of him for a while.

Then, we were standing on the dock also having a conversation, Donoway, Mr. Smith and myself, when I see him again.

[fol. 56] He was on the—this ledge of the barge, walking towards where the raft was tied up. So I turned my back for a moment, and I heard a little commotion, and looked around quickly, and I see Mr. Braen falling, and he was grabbing this one line and he landed on the raft.

* * * * * * *

MOTION FOR A DIRECTED VERDICT AND DENIAL THEREOF

Mr. Lamb: The defendant Pfeifer Oil Transportation Company, Inc. moves for a directed verdict on the ground that on the evidence in this case it appears that the plaintiff has not established a claim for which relief can be granted in this action.

The defendant bases that contention, if the Court please, upon these grounds:

1. The proof shows that at the time the plaintiff sustained his injuries, he was actually located upon a work

barge known as the Winisook, and was attempting to proceed from that barge to a raft, or attempting to shift a raft to put materials on that raft for the purpose of laying a decking on that raft.

There is no dispute in this case that that is the work that the plaintiff was doing at the time of his injury. There being no such dispute, the defendant contends that the proof shows affirmatively that the plaintiff at the time that he sustained his injury was not then engaged as a member of the crew of the Pfeifer II in performing work as a member of the crew of that vessel, and accordingly his work at the time was that of an ordinary maritime worker, who in respect of his employer is covered by the provisions of the Longshoremen's Harbor and Workmen's Compensation Act, which is, by the terms of that act, made the exclusive remedy of such an employee as against his employer.

The Court: May I interrupt there for a moment? I don't quite follow you on that.

[fol. 57] Is it your position that unless a member of the crew is actually at work or on the vessel itself that he could have no claim for anything that happens off the vessel?

Mr. Lamb: No, sir.

That is not my point.

I concede that a man who is a member of the crew of the vessel who may not be on board, may sustain an injury not on board the vessel, but may still have a right of action under the Jones Act.

I do not make that contention.

My contention is that the character and nature of the work the man is performing at the time the injury is sustained, is what governs his remedy; whether or not it comes under the Jones Act or under the Longshoremen's Harbor Workmen's Compensation Act.

And even though the man's general employment may be as a member of the crew, if at the time he sustains an injury he is doing something which is not part of his employment as a member of the crew and not related to carrying out his functions as a crew member, that then he may not recover under the Jones Act.

The Court: Isn't that a question of fact?

Mr. Lamb: It may be a question of fact, your Honor. In many cases it is a question of fact. I say, here it isn't.

* * * * * * *

Mr. Lamb: I further move for a directed verdict in favor of the defendant, Pfeifer Oil Transportation Company, if the Court please, on the ground that as to the claim which was asserted at the outset of the trial as to which I made a motion at the beginning of the trial for the withdrawal of [fol. 58] the claim from consideration in this case, namely, a claim based upon unseaworthiness.

(Off the record discussion.)

* * * * * * *

Mr. Kilroe: The claim of unseaworthiness that was presented at the beginning of the trial and is now being eliminated by stipulation from the case and that the case will be submitted to the jury solely under the provisions of the Jones Act.

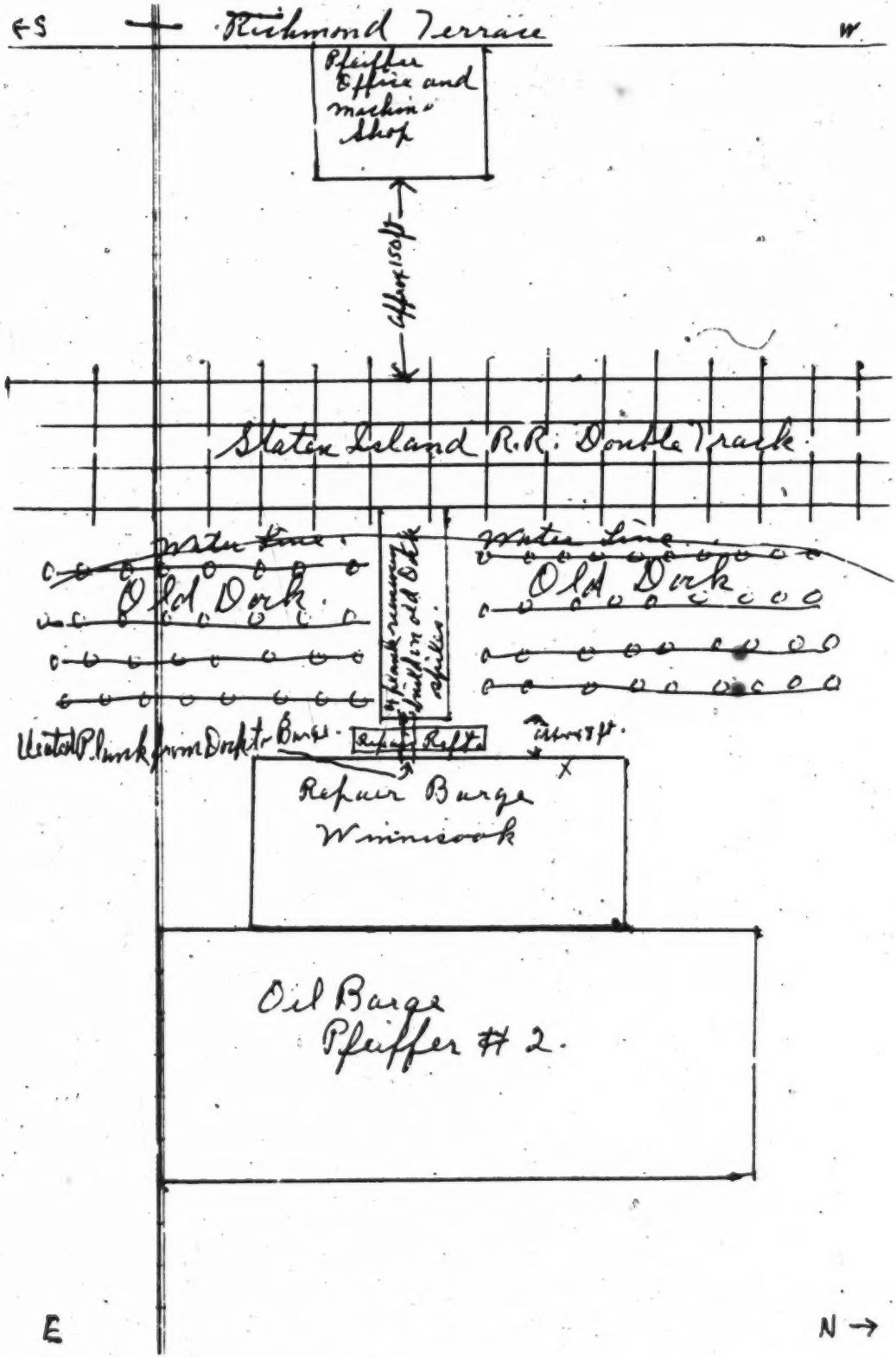
* * * * * * *

I have got a motion for a directed verdict on the ground that the plaintiff has failed to make out a claim under the Jones Act because he has failed to show that at the time of his injury he was engaged in work as a member of the crew of the Pfeifer II, and that the proof shows that the injury arose out of and in connection with the carrying on of carpentry work which was unrelated to his work as a member of the crew of the Pfeifer II.

The Court: Motion is denied.

* * * * * * *

PLAINTIFF'S EXHIBIT "1"—DIAGRAM SHOWING THE DOCK, RAFT AND OIL BARGES



[fol. 60]

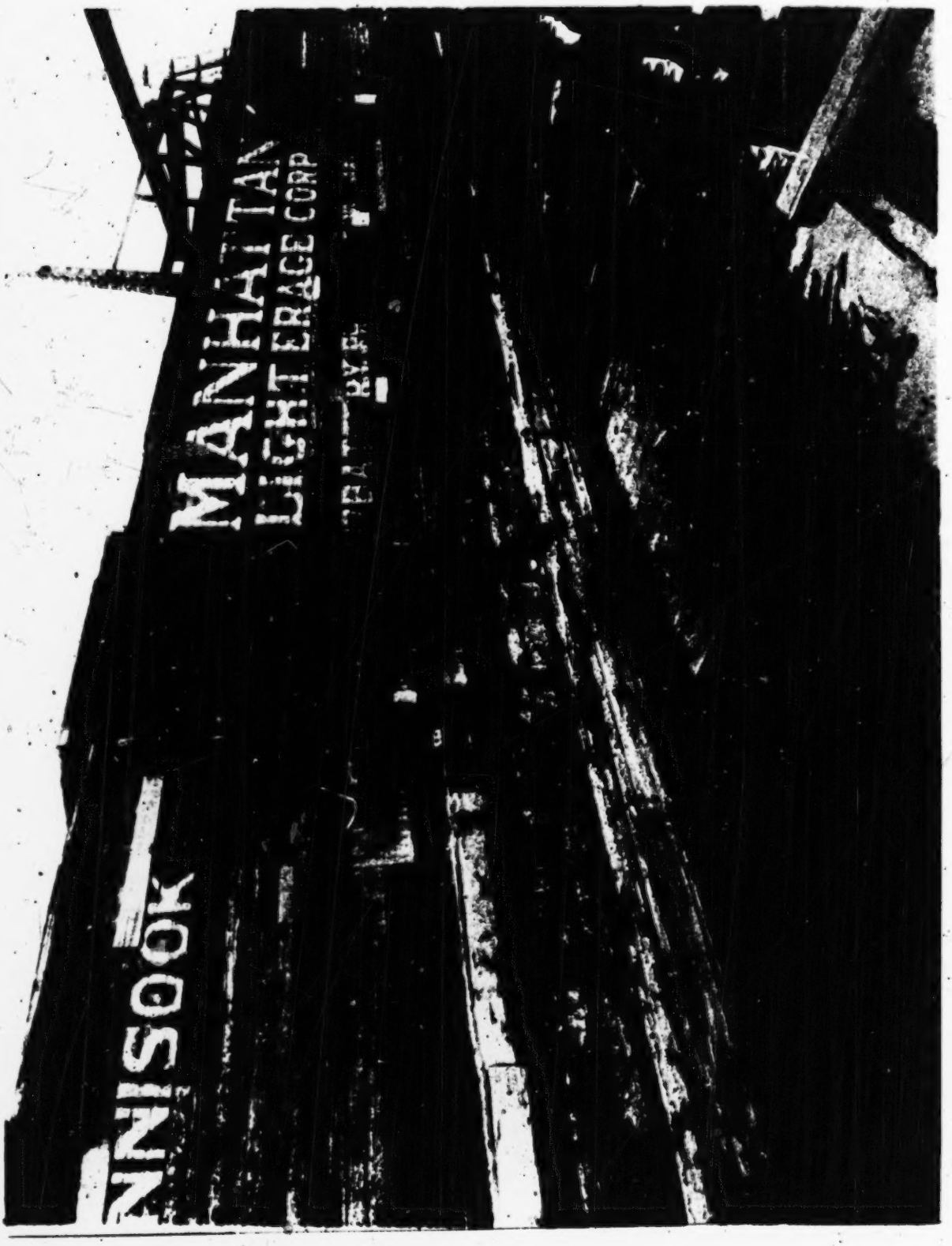
PLAINTIFF'S EXHIBIT "2"—PHOTOGRAPH OF THE BARGE, WINISOOK

[fol. 61]

DEFENDANT'S EXHIBIT "A"—PHOTOGRAPH OF THE BARGE, WINISOOK

[fol. 62]

DEFENDANT'S EXHIBIT "B"—PHOTOGRAPH OF THE BARGE, WINISOOK



[File endorsement omitted]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. 13929

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

against

PFEIFFER OIL TRANSPORT CO., INC., Defendant-Appellant.

Appellee's Appendix—Filed October 2, 1958

Bernard Rolnick, Attorney for Plaintiff-Appellee.
Benjamin H. Siff, Of Counsel.

[fol. 65]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TRIAL

CHRISTIAN F. BRAEN, the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

* * * * * * *

Q. Now, prior to January 22nd, 1953, had you had occasion in the several months that you had been on the Pfeiffer No. 2 to observe this catwalk on the Winisook?

A. I did.

Q. And what were the occasions on which you observed this catwalk on the Winisook prior to the date of this accident?

A. Well, it was whenever the boat tied up on the week-end, that is—where they tied up. That was generally on a Friday night that they tied up. That barge, the doors on that barge would remain open until the mechanics came home at four or half-past four in the afternoon. After that, in order for us to get off our barge, we would have to go down on the ledge of the Winisook, walk around one of the other ends of it, and back along the catwalk until we reached a point opposite the dock and then there was a catwalk just as—well, a cleated plank or two planks cleated together that we would climb up to the dock and proceed on our way.

We would reverse the procedure coming back on Sunday, midnight or whenever we were ordered aboard.

* * * * * * *

Q. Can you tell us, on the occasions that you were on the Winisook before this accident, about the condition, or could you describe the condition of this catwalk to us?

A. Yes, sir.

The catwalk, being a very old barge, a catwalk, the catwalk was in very bad shape. It was splintered, worn, [fol. 66] rounded at the edges, and wasn't composed of any one single plank, but of a series of planks that were more or less laid one after another, one against another in order to make that ledge.

Q. Now, I notice in this photograph that there is a line running along the side; and it looks like a wire attachment above the catwalk.

A. Yes, sir.

Q. What did you call that line?

A. That would be a life line, safety line.

Q. And how far above the catwalk was this life line or safety line, a distance, your best estimate?

A. Well, it was close to four foot.

Q. How tall are you?

A. Five feet, nine and a half inches.

Q. Now, on the side of this opening where that davit was located, I am talking now prior to the accident, were there any handles or other safety devices on the side of that opening before the accident?

A. No, sir.

Q. Now, before the accident was that life line that you see in the picture in the same position as shown in that photograph?

* * * * * * *

How was the raft attached to the Winisook?

A. The raft was attached to the Winisook by means of a line, I would say that it would be an inch or an inch and a half line, and secured to this center davit or bitt.

Q. How did you get down from the Winisook or what method was used to get from the Winisook down to the raft?

A. Well, the raft was practically unreachable where it laid. In order to get down on the raft, it had to be moved up to one of the doors so that you could put a ladder down to it.

* * * * * * *

[fol. 67] Q. Now, Mr. Braen, prior to the date of your accident, have you ever spoken to any of your superiors about the condition of this catwalk?

A. I had.

Q. Who did you speak to?

A. We had discussed several times aboard the boat, Captain Hull, among other crew members of the fleet, and I am sure at one time or another had mentioned the condition to Mr. Smith.

Q. As a result of that conversation was any change made of that catwalk?

A. None that I am aware of.

* * * * * * *

Q. Now, what was your pay as a mate on the date of your accident per month?

A. As I recall it, our hourly rate of pay at that time was somewhere around one dollar, seventy cents an hour.

Q. And you worked a twelve-hour day for two weeks, is that right?

A. Yes, sir.

* * * * * * *

Q. And during the period that you were laid up, if I understand it, I don't think there will be any dispute about

that, you were paid by the defendant, maintenance, amounting to nine hundred and eighty-seven dollars?

Mr. Lamb: We can put that in later.

Q. Is that right?
A. Yes, sir.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. Now, you said that prior to the accident you had had occasion to walk around what you called the catwalk of this barge on many occasions?

A. Yes, sir.

[fol. 68] Q. Getting off the barge and going ashore and coming back?

A. Yes, sir.

* * * * * * *

Q. Now, I want to make certain that we are not misunderstanding your testimony.

You said that your—something gave way under your foot, is that right?

A. Yes, sir.

Q. That is what you meant to indicate?

A. Yes, sir.

Q. And when that something gave way, did your foot simply slide inboard or did your foot go down off the edge of the barge?

A. My foot slid inboard against the side of the barge.

Q. And as this something, whatever it was, gave way, and your foot slid inboard, you went over to your right; is that the idea?

A. Yes, sir.

* * * * * * *

Redirect examination.

By Mr. Kilroe:

* * * * * * *

Q. Now, at any time either in your deposition or in this statement after you said that you slipped did any representative of the defendant ask you what caused you to slip?

A. No, sir.

Q. You said that something gave way under your foot as your foot slipped, right foot slipped inboard; is that correct?

A. Yes, sir.

* * * * * * *

Q. When your foot slipped as you testified, what did you feel under your foot, if anything?

A. A crumbling, rumbling sensation, a distinct feeling that something had given way under my foot.

* * * * * * *

[fol. 69] Recross examination.

By Mr. Lamb:

Q. Mr. Braen, you said in your testimony just a second ago, that when your right foot slipped, you felt like a crumbling sensation under the foot?

A. That is true.

* * * * * * *

Lester Hull, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

* * * * * * *

Q. And prior to January 22nd, 1953, did you go to this repair dock at West New Brighton?

A. Yes; we have been in there many a time. We used to tie up there on a week-end, if there was no work for the boat. They used to have it as a dock for tying up over the week-end.

Q. And I believe you said that you worked for this company about seven years before January 22nd?

A. Yes.

Q. 1953?

A. Yes.

Q. And during those seven years, did you have occasion to use the barge Winisook?

A. Yes; we had to cross the barge many times, and we had to do work on the barge which pertained to our own barge, which pertained to mechanical work, that we had to move our parts onto her.

* * * * * * *

Q. Now, you say that prior to January 22nd, 1953, you had occasion to cross the Winisook to and from your boat, go on the Winisook to and from it, for repairs?

A. That is right.

Q. During that time, did you ever have occasion to examine the catwalk on the Winisook?

[fol. 70] A. On the one end we did, because we did that pretty regular. If it was after four o'clock in the afternoon, the doors of the barge would be closed, and we would have to walk around the one end of her.

Q. I see.

Which end would that be?

A. That would be facing New York, east end, I guess.

Q. And did you have occasion at any time to walk on both catwalks?

A. Well, yes; occasionally we had to go around the other way.

Q. Now, can you tell us in these seven years that you were on and off the Winisook, the condition that you observed of the catwalk?

A. Well, not very wide. It is only about a foot wide, and it consists of two pieces of wood, which one is maybe ten inches wide and the other one is two inches wide or four inches wide, and the outer edge of it is pretty well splintered up in parts.

* * * * * * *

Q. Now, the afternoon that your boat arrived at the repair dock, did you do any work on your boat?

A. Yes, there was some work that I recall that we done. We were going to repair a pump which had broken down two days before, something like that. I know that we made one or two loads with the pump.

Q. When you say we, who are you referring to?

A. Mr. Braen and myself.

Q. And the next morning, did you do any work?

A. Yes; we turned to at quarter to eight—eight o'clock.

Q. And what did you do?

A. Well, there was a few small jobs that me and Mr. Braen could do ourselves which had to be done before the mechanics could work on the pump.

[fol. 71] Q. And that morning, did you do those small jobs?

A. Yes; we had everything all ready for when the mechanics, when they came in to put the pump back together again.

Q. Were you present when Mr. Braen was taken from the raft?

A. I wa

Q. Now, this raft has been testified to yesterday, this raft was used for welding at times?

A. Yes, sir.

Q. Was it used for any other purposes to work on the hull of the vessel?

A. Yes; we used to chip the hulls, paint the hulls.

Q. From this raft?

A. Yes.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. You knew that she was going to be there for some period of time?

A. Not for some period of time, I would say for the next day, anyway.

* * * * * * *

Q. Now, the following morning when you turned to,—you said about a quarter of eight?

A. Well, I got down to the boat, maybe a quarter after seven, seven-thirty, and eight o'clock we usually started the day.

* * * * * * *

Q. Well, now, can you recall just exactly what you did that morning after you got on the boat?

A. Well, I am not— If I am not mistaken, the first thing that we did—

Q. I said you. What did you personally do?

A. Well, I didn't do anything by myself. I had a helper.

[fol. 72] Q. You didn't do anything by yourself?

A. No, sir.

Q. Now, the first thing that you did do that morning,— who was helping you do it?

A. Mr. Braen.

Q. Now, Mr. Braen, then, you and he did what? The first thing that morning, did what?

A. The first thing we did that morning was to move some parts that we had already disassembled off the barge onto the Winisook.

Q. I presume that you must have disassembled it on the afternoon before?

A. The afternoon before which I already said.

Q. You had disassembled it?

A. Partly. I wouldn't say that we had the whole pump disassembled, but we had part of it.

Q. So that the next day, the first thing that you and Mr. Braen did was to move some parts of this, a disassembled pump, over to the Winisook?

A. That is right.

* * * * * * *

EDWARD J. SMITH, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

* * * * * * *

Q. Now, coming to the deck of the barge, which has been described as a catwalk, was there any occasion for any of the employees of the Pfeiffer Oil Transportation Company from time to time to use that, any part of the deck

of that barge other than purposes of getting at the lines that moored either the barge or the raft?

A. Yes, sir.

[fol. 73] Q. Will you tell us what occasion that would be?

A. Usually when we tied up during the week-end, or when we laid off the crew, particularly at night, if it happened at night, why, they would have to walk around it to get to shore.

Q. Were there times when the men did walk around it to get to shore?

A. Yes, sir.

* * * * * * *

Mr. Stephan Smith, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

* * * * * * *

Q. In doing that work, did you have any assistance?

A. Yes, sir.

Q. Who helped you?

A. Mr. Donoway, Mr. Braen and Mr. Hull.

Q. What time did you quit work that day?

A. Four-thirty.

* * * * * * *

Cross examination.

By Mr. Kilroe:

* * * * * * *

Q. Do you know whether or not the contract in existence between the union representing Mr. Braen and your corporation had any provisions in it about lay-offs?

A. No, I didn't.

* * * * * * *

The Court: Let me ask you this, Mr. Smith: During the period of four months or so that Mr. Braen worked on

[fol. 74] the Pfeiffer No. 2, had you had any prior occasion where you laid him off the ship on one day and you reemployed him the next day for some carpentry work or something?

The Witness: No, sir.

* * * * * * *

ALBERT CORNETTE, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. What is your business, Mr. Cornette?

A. I am a business agent for the United Marine Division, Local 333.

Q. And in 1953, was Mr. Braen a member of your organization?

A. Yes, sir.

Q. In 1953, did your organization have a contract with a number of companies, shipping companies, including the Pfeiffer Oil Company?

A. Yes, sir.

Q. Have you that contract with you, sir?

A. Yes, sir.

Q. Could I see this contract?

A. Yes, sir.

* * * * * * *

Voir dire examination.

By Mr. Lamb:

* * * * * * *

Q. That wasn't the question I asked you. The question that I asked you, is whether or not on January 22, 1953, before this contract went into effect on February 1, whether there was any provision in your then-labor contract with [fol. 75] respect to any prior notice to a man if he was

only being laid off for a day or two while a boat was tied up for only a day or two?

A. That clause covered him.

That clause was in the prior contract and that clause protected—pertained to the membership.

Q. Was there any other clause in the contract in effect prior to this one that would have relation to the situation whether or not any notice would be required to be given to a man if it were a matter of only a temporary lay-off for a day or two while a boat was temporarily laid off?

A. There were no other provisions except that.

* * * * * * *

Mr. Kilroe: That is the only thing that I am going to offer—that is the only thing I am going to refer to, your Honor, is this one clause, and I am going to request your Honor for permission to read this one clause K to the jury.

The Court: Yes, you may do so.

Mr. Kilroe: "Providing a vessel is in operation in excess of forty-eight consecutive hours there shall be no lay-offs of any of the crew except upon three days' notice to them after the vessel is moored in her berth. Vessels not so operating, there shall be no split time and the working day shall be from midnight to midnight. Employees who quit their job without giving three days' notice of intention to leave shall forfeit thereto to the employer three days' pay as liquidated damages."

* * * * * * *

[fol. 76] Cross examination.

By Mr. Lamb:

* * * * * * *

Q. Then what does it mean, on vessels not so operated, that would be a vessel not in operation in excess of forty-eight consecutive hours?

A. Well, that would mean this: That after a man is given his three-day notice, and he may be called to report to the vessel to do repairs on the vessel, then that clause would not apply.

* * * * * * *

CHRISTIAN F. BRAEN, the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Braen, you were present in the court yesterday when Edward Smith testified that he told you on the morning of January 22nd at about eight-thirty that you would be laid off. Did he ever make such a statement to you?

A. He did not.

Q. And his conversation with you was the conversation that you previously testified to, is that right?

Mr. Lamb: I object to the form of the question.

Q. The conversation that you had with Mr. Edward Smith was the conversation that you previously testified to?

Mr. Lamb: I object to the form of the question.

The Court: Overruled.

A. That is correct.

* * * * * * *

[fol. 77]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 40—October Term, 1958.

(Argued October 24, 1958)

Docket No. 25095

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

—v.—

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Before: Swan and Moore, Circuit Judges, and Kaufman, District Judge.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Bruchhausen, Judge, after trial to a jury in an action under the Jones Act, 46 U. S. C. A. §688. Reversed.

Purdy, Lamb & Catoggio, Attorneys for Appellant. Edmund F. Lamb of Counsel.

Bernard Rolnick, Attorney for Appellee. Benjamin H. Siff of Counsel.

OPINION—Decided January 23, 1959

Swan, Circuit Judge:

This is an action brought under the Jones Act, 46 U. S. C. A. §688, in which plaintiff recovered judgment after a [fol. 78] jury trial. The principal question presented by the appeal is whether at the time of his accident plaintiff was a "seaman" injured in the course of his employment within the meaning of the Jones Act, which provides in pertinent part:

> "Any seaman who shall suffer personal injuries in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *"

The appellant contends that plaintiff at the time of his injury was subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, which provides his exclusive remedy against appellant.

Plaintiff was employed as mate on appellant's barge Pfeifer No. 2. On the day prior to his injury, which occurred on January 22, 1953 Pfeifer No. 2 came to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. At the repair yard defendant maintained a covered lighter, known as the Winisook, which was used as a work barge. Its inshore side was connected with the dock by a plank runway, and between the Winisook and the dock was a raft which was employed in making cer-

tain kinds of repairs but was not intended to be used and was not used in repairing the cargo pump or Pfeifer No. 2. When the No. 2 was brought to the repair yard she was moored to the outshore side of the Winisook. On the morning of the accident plaintiff worked aboard for about an hour in dismantling the cargo pump. He was then ordered by defendant's vice-president in charge of repair work to perform some carpentry work on the above mentioned raft.[1] [fol. 79] Plaintiff collected carpentry tools to be used by him on the raft and then proceeded along the "catwalk" on the side of the Winisook preparatory to boarding the raft and commencing work on it. While doing so he fell from the Winisook to the raft, sustaining the injuries for which he sued.

At the close of plaintiff's case defendant moved to dismiss the action. Decision on the motion was reserved. Defendant's motion for a directed verdict at the close of the entire case was denied. A motion for judgment n.o.v. was also denied. On its appeal defendant argues (1) that plaintiff as a matter of law is not entitled to maintain suit under the Jones Act, (2) that even if the evidence gives rise to a fact issue as to plaintiff's right to maintain the suit, the trial court failed to instruct the jury properly, and erred in denying defendant's requests to charge; and (3) that error was committed in denying defendant's motion to strike plaintiff's testimony that something on the Winisook gave way causing him to fall.

---

[1] Plaintiff testified on direct examination as follows:

"Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something? A. I did.

Q. And who did you receive orders from? A. Mr. Edward Smith.

Q. And will you tell us what orders you received? A. We had been busy for approximately an hour, and Mr. Smith determined that it was too much help on the one job, and he said, 'Mr. Braen, you were formerly a carpenter,' and I said, 'Yes.'

He said, 'Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done.'

Well, that was it."

It is established law that determination as to whether a maritime employee, who may generally be classified as a seaman, may recover indemnity for injuries under the Jones Act or is limited in a federal court to compensation under the Longshoremen's and Harbor Workers' Compensation Act depends upon the nature of the service being performed at the time the injuries are sustained.[2] The Longshoremen's [fol. 80] Act restricts the benefits of the Jones Act to "members of a crew of a vessel." *Swanson* v. *Marra Bros.*, 328 U. S. 1. To recover, therefore, the present appellee had to be a member of the crew of Pfeifer No. 2, as that term is used in the Longshoremen's Act, at the time of his injury. See *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371. In that case a verdict for Senko was set aside on appeal upon the ground that the evidence was insufficient to support the finding that he was a member of a crew. This in turn was reversed, a majority of the Supreme Court holding that there was sufficient evidentiary basis for the jury's finding. In so holding the court cited *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 for the proposition that "whether or not an employee is 'a member of a crew' turns on questions of fact," and that if a finding on the question has evidence to support it, the finding is conclusive. We are well aware that a jury verdict is not to be upset by an appellate court, if there is any evidence to support it. But we do not understand that, when there is no such evidence, the appellate court may not upset the verdict.[3] In the case at bar there was no contradiction of plaintiff's testimony as to the nature of the service he had been ordered to perform and was about to perform when the accident happened. Nor does the record contain, in our opinion, any evidence susceptible of contrary inferences. Consequently we believe that plaintiff was subject to the Longshoremen's Act,

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[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371.

[3] See *Norton* v. *Warner*, 321 U. S. 565, and the dissenting opinions in the *Senko* case, 352 U. S. 374-379, and in *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. ——, 2 L. Ed. 737.

not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of Pfeifer No. 2, and that defendant's motion for a directed verdict should have been granted.

[fol. 81] However, should we be wrong in thinking that no jury question was presented, the case might be returned to us to pass upon the appellant's contention as to the instructions given the jury.[4] Therefore we shall consider them. We are convinced that the charge on this subject was inadequate. The court charged:

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.
>
> Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

Following defendant's exception to the charge, the court stated in a supplemental charge:

> "I just want to make one amendment to my statement to you, ladies and gentlemen.
>
> I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently, according to the defendant's statement, he says that it is a serious issue.
>
> So I will leave that as an issue."

This only added further confusion to the original charge which failed to give the jury any test for determining whether the Jones Act was applicable to plaintiff. Defendant's exceptions to the charge were well justified. The court refused to submit four requests to charge which em-

---

[4] In the *Senko* case, at page 372, the court noted that the jury's finding "was made under specific instructions not objected to here."

[fol. 82] body a correct statement of the applicable law and should have been given, at least in substance.[5]

We see no merit in appellant's contention that plaintiff's testimony that something "gave way" on the Winisook causing him to fall should have been stricken.

For the reasons stated in the first part of our discussion we think the motion for a directed verdict should have been granted. Accordingly the judgment is reversed with directions to dismiss the complaint.

KAUFMAN, District Judge (dissenting):

I fully agree with the majority as to the insufficiency of the lower court's charge with respect to plaintiff's status at the time he was injured. On that ground, I would reverse and remand. However, the majority has gone further and directed a dismissal of the complaint and on this point I must regretfully dissent.

In effect, the court finds as a matter of law that the plaintiff was not injured in the course of his employment [fol. 83] as a seaman or crew member. As the majority concedes this is a factual question and as such is properly left to the jury whose finding will not be disturbed if there

---

[5] Defendant's requests read as follows:

"1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeifer #2 prior to his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the Pfeifer #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the Pfeifer #2 expressly for the purpose of furthering the repair of the Pfeifer #2 in order to enable it to continue in navigation, your verdict must be for the defendant."

is any evidence to support it. In my opinion there was sufficient evidence in this case to enable a jury to reasonably find that plaintiff was a seaman in the course of his employment at the time he was injured. See *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 (1958); *Butler* v. *Whiteman*, 356 U. S. 271 (1958); *Senko* v. *LaCrosse Dredging Co.*, 352 U. S. 370 (1957).

I would therefore reverse and remand for a new trial.

[fol. 84]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

v.

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

JUDGMENT—January 23, 1959

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded with directions to dismiss the complaint in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 86] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 87]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—March 30, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFFER OIL TRANSPORT CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

CHRISTIAN F. BRAEN,

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against

PFEIFFER OIL TRANSPORT CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Christian F. Braen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action pursuant to its decision dated January 3, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (Swan, C.J., concurred in by Moore, C.J., Kaufman, D.J., dissenting) which reversed the District Court for the Eastern District of New York (Bruchhausen, J.) is not reported. A copy thereof is contained in the Appendix, at pages 15-20. There was no opinion by the District Court Judge.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1959. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Where in a Jones Act case a jury has found that the injured was a seaman and a member of a crew hurt in the course and scope of his employment by the negligence of his employer so as to be entitled to his remedies under the statute, and the District Judge has denied motions to set the verdict aside and for judgment n.o.v., was there that complete absence of probative facts to support the conclusion reached by the jury (*Lavender* v. *Kern*, 327 U. S. 645, 653), which empowered the Court of Appeals to overturn the jury findings on the issue of the injured's status at the time he was hurt and itself direct final judgment against the injured?

2. If the Court of Appeals erred in holding that there was no question of fact as to the status of the petitioner at the time he was injured, should the case be remanded for a new trial because of the alleged deficiencies in the District Court's instructions to the jury on that issue?

STATUTES INVOLVED

The statutes involved are the Jones Act (46 U. S. C. A. 688) and the Longshoremen & Harbor Workers' Compensation Act (33 U. S. C. A., Sec. 901 *et seq.*), printed in the Appendix annexed hereto, *infra,* at pp. 21-22.

STATEMENT OF THE CASE

Preliminary

This is not a case where a temporary worker on a ship whose general employment and duties are unconnected with the vessel seeks to assume the mantle of a seaman or a member of a crew in order to gain the benefits of the Jones Act. In this case, the injured had been in a continuous and long employ as a seaman and a member of the crew of the barge and the Pfeiffer No. 2, and had never been discharged from his employment. It is conceded that at 8:00 o'clock in the morning of the day of his accident, petitioner was working aboard the Pfeiffer as a seaman and a member of its crew. It is conceded that when he was injured less than an hour later by a fall from another of his employer's barges, the Winisook, to which the Pfeiffer No. 2 had been moored, he was about to do work that his employer had directed him to do.

The question here presented is simply this: did anything happen in that hour or less between 8:00 o'clock in the morning and the time he was injured to disestablish him as a seaman and a member of the crew and to transform him into something else. The jury has said that nothing had happened to cause this transformation, the Court of Appeals has said that as a matter of law there had been such a transformation.

FACTS

The Pfeiffer Oil Company was in the business of transporting petroleum products; in the conduct of that business it used barges and tug boats (Pfeiffer App., p. 48). Petitioner was a seaman who had Coast Guard ratings as a Chief Cook, Chief Steward and a Barge Tankman's Certificate (Pfeiffer App., p. 22).

He had been employed by Pfeiffer as a mate aboard its barge, the Pfeiffer No. 2, for about four months prior to January 22, 1953 (Pfeiffer App., pp. 21, 22, 23, 42). As of January 22nd he had been working twelve hours a day for two weeks (Braen App., p. 4). His duties were:

> "My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel; it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.
>
> "We handled the hose for the loading and the unloading of the cargo, which we refer to as the cargo hose, and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things

like that; and minor repairs, repairs that we could handle between the two men aboard the barge." (Pfeiffer App., p. 22)

The Captain of the Pfeiffer No. 2 testified to the same effect (Pfeiffer App., p. 42).

Petitioner was protected in his employment status by a union contract (Pfeiffer App., p. 22; Braen App., p. 11). This contract provided that a crew member could not be laid off except on three days' notice after a vessel was moored in her berth (Braen App., p. 12). The contract also protected the employer, providing that if a crew member quit his job without giving him three days' notice of his intention to leave, he forfeited three days' pay to the employer (Braen App., p. 12).

A day or two before the accident, while the Pfeiffer was in transit, one of its pumps became out of order (Pfeiffer App., p. 23). Accordingly, the vessel was ordered to Pfeiffer's repair yard at West New Brighton, Staten Island, where it arrived on January 21, 1953 (Pfeiffer App., pp. 23-24; Braen App., p. 54).

Among the facilities maintained by Pfeiffer for the repair of its vessels at the West New Brighton Yard was a floating barge, the Winisook (Pfeiffer App., pp. 29, 36, 37, 43, 49, 53; Exhibit 2 at Pfeiffer App., p. 60; Exhibit B at Pfeiffer App., p. 62). It was secured to the dock by lines and cables (Pfeiffer App., pp. 43, 45, 46, 53), an arrangement that permitted the barge to be shifted and turned around in the water when necessity or convenience in repair dictated the need (Pfeiffer App., p. 31).

The space between the Winisook and the dock was occupied by a floating raft (Pfeiffer App., p. 27), depicted

in the exhibits at pages 60 and 62 of Pfeiffer's Appendix. It was held in place by a line attached to the Winisook (Braen App., p. 3).

The purpose of the raft, owned by Pfeiffer (Pfeiffer App., p. 49) was to facilitate chipping, painting and welding work on such of Pfeiffer's vessels as required such procedures (Pfeiffer App., p. 30; Braen App., p. 8).

When the Pfeiffer No. 2 arrived at West New Brighton it was moored to adjoin the open water side of the Winisook (Exhibit 1 at Pfeiffer App., p. 59). It was going to be there for no more than a day or two (Braen App., p. 8). It was admitted that in order for the crew of the Pfeiffer No. 2 to leave or board it, they had to go by way of the Winisook, utilizing a planked ledge or catwalk that ran around its sides (Braen App., pp. 2, 4-5-6, 9, 10), Exhibit 1 in Pfeiffer App., p. 60; Exhibit B in Pfeiffer App., p. 62). In other words, the catwalk of the Winisook was a necessary means of passage from and to the Pfeiffer No. 2.

The catwalk had been in bad shape for a long time, splintered and worn (Braen App., pp. 2, 3, 7). Complaints had been made to those in authority but nothing had been done about it (Braen App., p. 4).

When the Pfeiffer was moored on January 21st, petitioner, together with others, began work on disassembling the defective pump (Pfeiffer App., pp. 24, 31). Work ceased at approximately 4:00 o'clock in the afternoon, to be resumed at 8:00 o'clock the next morning (Pfeiffer App., pp. 31, 32). In the interval, petitioner ate and slept aboard the Pfeiffer No. 2 (Pfeiffer App., p. 24). Shortly after plaintiff resumed work at 8:00 o'clock in the morning on January 22nd, Edward Smith, the overall repair boss

for the Pfeiffer Company, appeared (Pfeiffer App., pp. 26, 50) and told petitioner that there was too much help on the one job; accordingly, he directed petitioner to "finish putting this top deck of planks on this raft over here so we can use it. Get this job done" (Pfeiffer App., p. 26).

The nature of the conversation between Smith and the petitioner was in dispute. Smith testified that he told petitioner that he had to be laid off, but offered him an opportunity to make some money by decking the raft and the petitioner accepted the invitation (Pfeiffer App., p. 50). This alleged layoff was categorically denied by petitioner (Pfeiffer App., p. 13). It was this purported layoff that bottomed the employer's contention during the trial that at the time of his injury, petitioner was not a member of a crew but a shipyard carpenter. Suffice it to say on this aspect of the case that it was for the jury to decide what the conversation had been.

As petitioner was making preparations to descend from the Winisook to the raft in compliance with the orders that had been given him, a part of the catwalk on which he was standing suddenly gave way and he was thrown to the raft, sustaining serious personal injuries (Pfeiffer App., pp. 27-29; Braen App., p. 5).

The Pfeiffer Company had paid petitioner cure and maintenance for the injuries sustained in this accident (Braen App., p. 4).

On the basis of the above, the jury found that petitioner was a seaman and a member of the crew who was injured in the course and scope of his employment as such, entitling him to his remedy under the Jones Act.

The Court of Appeals has held that there was no jury question on the issue; that as a matter of law, "he was not injured in the course of his employment as a seaman or as a member of the crew of the Pfeiffer No. 2, and that defendant's motion for a directed verdict should have been granted" (App., p. 18).

REASONS FOR GRANTING WRIT

As to the First Question Presented

(1) The ruling of the Court of Appeals poses the question of its right and power to overturn a jury finding and direct entry of a final judgment in an area where the Court itself has conceded that issues were usually for the jury (App., p. 18). The underlying question is when is there that complete absence of probative facts to support the conclusion reached by a jury which empowers a Court of Appeals to act as this one had done.

As to the issue of petitioner's status at the time of his injury, there was the evidence that the injured had been a seaman and a member of a crew for four months up to within an hour of his accident; that he had not been laid off when the accident happened; that he could not have been laid off because of contractual provisions. There was the further evidence that the petitioner, in doing what he did and being where he was, when hurt, was acting in performance of direct orders given by his employer. There was the evidence, in the nature of admission against interest, that the employer had paid the petitioner cure and maintenance for the injuries sustained in the accident in suit.

This proof, it is submitted, comprises a more than sufficient nexus of probative facts on the issue of petitioner's status as a seaman and a member of the crew at the time he was injured so as to preclude the Court of Appeals from nullifying the jury's finding to that effect and itself directing final judgment to the contrary. It is submitted that on the very face of it there was not that absence of probative facts which empower a Court of Appeals itself to decide an issue which is fundamentally for the jury.

The ruling of the Court of Appeals bespeaks perhaps the need for a definition of what is it that constitutes such a complete absence of probative facts on the issue of whether an injured is a seaman within the meaning of the Jones Act as to allow determination of the issue as a matter of law.

Insofar as determining whether the services performed by the petitioner at the time of his accident were services performed by a seaman is concerned, there is a test. It is that "the duties of a man during the vessel travelling are relevant in determining whether he is a member of a crew while the vessel is anchored." *Senko* v. *LaCrosse Dredging Company*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Company*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271.

The undisputed evidence that petitioner's duties as a seaman included minor repairs (Pfeiffer App., p. 22) joined with the proof that that was what he had been directed to do and he was about to do when injured, necessarily establish that there was a question of fact as to whether the services he had been ordered to perform was the work of a seaman and a member of the crew of the Pfeiffer No. 2.

The basis for the refusal of the Court of Appeals to apply the above test, which was the test submitted to the jury by the District Court (Pfeiffer App., p. 5), has not been explained. The ruling, on the face of it, is in conflict with this Court's decisions in *Senko* v. *LaCrosse Dredging Company*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Company*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271.

(2) The Court of Appeals has noted that the raft that petitioner was about to work on pursuant to the orders of his employer was not intended to be used and was not used in repairing the cargo pump of the Pfeiffer No. 2 (App., p. 16).

If that was the basis of the Court of Appeals' ruling, it was an irrelevance. Smith testified that the raft was not intended to be used in connection with the Pfeiffer No. 2 *at that time* (Pfeiffer App., p. 52). The phraseology certainly betokens that somewhere along the line the raft was going to be used in connection with the Pfeiffer No. 2 in the same manner that it was used to repair and maintain other vessels of the Pfeiffer Company, or so a jury could find.

Moreover, the law is that it is not necessary for the application of the Jones Act that the work during which injury occurs be work immediately connected with the navigation of the vessel. *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014, certiorari denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, certiorari denied 324 U. S. 872; *Wong Bar* v. *Suburban Petroleum Transport*, 119 F. 2d 745.

In the *Hunt* case, plaintiff was injured while painting rust spots in the hold while the vessel was in drydock undergoing repairs that would take two or three weeks to accomplish. The Court held that plaintiff was a member of the crew entitled to his remedy under the Jones Act even though he had not signed ship's articles.

In the *Butler* case, a tug was undergoing rehabilitation preparatory to a coast guard inspection, presumably in anticipation of a return to service. During the period of the tug's inactivity decedent was employed as a laborer doing odd jobs on defendant's wharf. At the time of the accident, plaintiff was on his way to the tug in order to clean its boilers. It was held that whether plaintiff was a seaman and a member of the crew entitled to the remedies of the Jones Act was for the jury.

In the *Marceau* case, the injured fell on a dock as he approached the ship while returning from shore leave where he had been on personal business. It was held he was entitled to his remedy under the Jones Act.

In the *Wong Bar* case, plaintiff was injured while he was leaving the vessel after having been told that no work was required of him and that he was free to go home. It was held that he was within the purview of the Jones Act.

If seamen told to depart because there is no work, or returning from a personal errand are granted the protections of the Jones Act, then, of necessity, the petitioner, a seaman injured while doing work he was so ordered to do, on a barge owned by his employer, is equally protected.

---

(3) The fact that the accident did not happen on the Pfeiffer No. 2 proper but on the catwalk of the Winisook

to which it was moored is immaterial since the catwalk of the Winisook was a necessary means of passage for the members of the Pfeiffer's crew who were required to leave or board it. It not being physically a part of Pfeiffer No. 2 in no wise vitiates the employer's duties and obligations under the Jones Act. *Pettersen* v. *Alaska Steamship Co.*, 346 U. S. 914; *Standard Oil Co.* v. *Robbins Dry Dock*, 32 F. 2d 182; *Earles* v. *Howard*, 270 F. 225; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, cert. denied 324 U. S. 872; *Chesapeake & Ohio Railroad Co.* v. *Thomas*, 198 F. 2d 783, cert. denied 344 U. S. 921.

As to the Second Question Presented

The Court of Appeals has said that should it be wrong in thinking that no jury question was presented on the issue of petitioner's status and the case remanded to it, it would order a new trial for deficiencies in the District Court's instructions to the jury on that issue (App., pp. 18-21).

It is submitted that there is no warrant for such action.

As to Pfeiffer's Request No. 1

The District Court nowhere suggested that merely because plaintiff had been a seaman meant that he was a seaman at the time of the accident. It specifically made petitioner's activities at the time of the accident the test of his then status. The Court's charge was substantially the holding of the Court in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, where it was said at page 373:

> "If he were a member during travel he would not necessarily lack that status during anchorage • • •

in short the duties of a man during a vessel's travel are relevant in determining whether he is a member of a crew while the vessel is anchored."

Defendant's request was phrased in the negative, i.e., merely because plaintiff had been a seaman did not make him a seaman at the time of the accident. Such a negative request did not serve to clarify any issue. Counsel might as well have requested a charge that merely because plaintiff had Coast Guard papers or had a certificate as a tank man or was a member of a seaman's union did not mean that he was a seaman at the time of the accident. The number of such negatives is limited only by the ability of counsel to conjure them up. Since the issue was plainly put to the jury that plaintiff's activities at the time of the accident were what determined his right to recover, the claim of error in the refusal to charge was without substance.

As to Pfeiffer's Request No. 2

This request was substantially charged (Pfeiffer App., p. 5). Since the substance of the request was charged, there can be no error for not using defendant's phraseology.

As to Pfeiffer's Requests Nos. 3 and 4

These requests made navigation of the vessel or furtherance of its navigation the conclusive test of plaintiff's being a seaman and a member of the crew. Such is not the law.

> "Admiralty jurisdiction and the coverage of the Jones Act depends on the finding that the injured was 'an employee of the vessel engaged in the course of his employment' at the time of his injury." *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

Accordingly, it has been held that it is not necessary for the application of the Jones Act that the injured be one who aids in the navigation of a vessel. The statute has been applied to such diverse employees as a cook, a bartender, a telephone operator and a musician, to name but a few. Norris, *The Law of Seamen*, Sec. 651. See also *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014, cert. denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271; *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, cert. denied 324 U. S. 872.

The requests, not embodying a fully correct statement of applicable law, were properly refused.

CONCLUSION

In view of these considerations the petitioner respectfully submits that this petition should be granted.

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APPENDIX

Opinion of the United States Court of Appeals For the Second Circuit

No. 40—October Term, 1958.

(Argued October 24, 1958 Decided January 23, 1959.)

Docket No. 25095

CHRISTIAN F. BRAEN,

Plaintiff-Appellee,

—v.—

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Defendant-Appellant.

Before:

SWAN and MOORE, *Circuit Judges*, and
KAUFMAN, *District Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Bruchhausen, *Judge*, after trial to a jury in an action under the Jones Act, 46 U. S. C. A. §688. Reversed.

SWAN, *Circuit Judge*:

This is an action brought under the Jones Act, 46 U. S. C. A. §688, in which plaintiff recovered judgment after a jury trial. The principal question presented by the appeal is whether at the time of his accident plaintiff was a "sea-

man" injured in the course of his employment within the meaning of the Jones Act, which provides in pertinent part:

> "Any seaman who shall suffer personal injuries in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *"

The appellant contends that plaintiff at the time of his injury was subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, which provides his exclusive remedy against appellant.

Plaintiff was employed as mate on appellant's barge Pfeifer No. 2. On the day prior to his injury, which occurred on January 22, 1953 Pfeifer No. 2 came to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. At the repair yard defendant maintained a covered lighter, known as the Winisook, which was used as a work barge. Its inshore side was connected with the dock by a plank runway, and between the Winisook and the dock was a raft which was employed in making certain kinds of repairs but was not intended to be used and was not used in repairing the cargo pump of Pfeifer No. 2. When the No. 2 was brought to the repair yard she was moored to the outshore side of the Winisook. On the morning of the accident plaintiff worked aboard for about an hour in dismantling the cargo pump. He was then ordered by defendant's vice-president in charge of repair work to perform some carpentry work on the above mentioned raft.[1]

---

[1] Plaintiff testified on direct examination as follows:

"Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something? A. I did.

Q. And who did you receive orders from? A. Mr. Edward Smith.

Q. And will you tell us what orders you received? A. We had been busy for approximately an hour, and Mr. Smith deter-

Plaintiff collected carpentry tools to be used by him on the raft and then proceeded along the "catwalk" on the side of the Winisook preparatory to boarding the raft and commencing work on it. While doing so he fell from the Winisook to the raft, sustaining the injuries for which he sued.

At the close of plaintiff's case defendant moved to dismiss the action. Decision on the motion was reserved. Defendant's motion for a directed verdict at the close of the entire case was denied. A motion for judgment n.o.v. was also denied. On its appeal defendant argues (1) that plaintiff as a matter of law is not entitled to maintain suit under the Jones Act, (2) that even if the evidence gives rise to a fact issue as to plaintiff's right to maintain the suit, the trial court failed to instruct the jury properly, and erred in denying defendant's requests to charge; and (3) that error was committed in denying defendant's motion to strike plaintiff's testimony that something on the Winisook gave way causing him to fall.

It is established law that determination as to whether a maritime employee, who may generally be classified as a seaman, may recover indemnity for injuries under the Jones Act or is limited in a federal court to compensation under the Longshoremen's and Harbor Workers' Compensation Act depends upon the nature of the service being performed at the time the injuries are sustained.[2] The Longshoremen's Act restricts the benefits of the Jones Act to "members of a crew of a vessel." *Swanson* v. *Marra*

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mined that it was too much help on the one job, and he said, 'Mr. Braen, you were formerly a carpenter,' and I said, 'Yes.'

He said, 'Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done.'

Well, that was it."

[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371.

Bros., 328 U. S. 1. To recover, therefore, the present appellee had to be a member of the crew of Pfeifer No. 2, as that term is used in the Longshoremen's Act, at the time of his injury. See *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371. In that case a verdict for Senko was set aside on appeal upon the ground that the evidence was insufficient to support the finding that he was a member of a crew. This in turn was reversed, a majority of the Supreme Court holding that there was sufficient evidentiary basis for the jury's finding. In so holding the court cited *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 for the proposition that "whether or not an employee is 'a member of a crew' turns on questions of fact," and that if a finding on the question has evidence to support it, the finding is conclusive. We are well aware that a jury verdict is not to be upset by an appellate court, if there is any evidence to support it. But we do not understand that, when there is no such evidence, the appellate court may not upset the verdict.[3] In the case at bar there was no contradiction of plaintiff's testimony as to the nature of the service he had been ordered to perform and was about to perform when the accident happened. Nor does the record contain, in our opinion, any evidence susceptible of contrary inferences. Consequently we believe that plaintiff was subject to the Longshoremen's Act, not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of Pfeifer No. 2, and that defendant's motion for a directed verdict should have been granted.

However, should we be wrong in thinking that no jury question was presented, the case might be returned to us to pass upon the appellant's contention as to the instruc-

[3] See *Norton* v. *Warner*, 321 U. S. 565, and the dissenting opinions in the *Senko* case, 352 U. S. 374-379, and in *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 2 L. Ed. 737.

tions given the jury.[4] Therefore we shall consider them. We are convinced that the charge on this subject was inadequate. The court charged:

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.
>
> Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

Following defendant's exception to the charge, the court stated in a supplemental charge:

> "I just want to make one amendment to my statement to you, ladies and gentlemen.
>
> I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently, according to the defendant's statement, he says that it is a serious issue.
>
> So I will leave that as an issue."

This only added further confusion to the original charge which failed to give the jury any test for determining whether the Jones Act was applicable to plaintiff. Defendant's exceptions to the charge were well justified. The court refused to submit four requests to charge which em-

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[4] In the *Senko* case, at page 372, the court noted that the jury's finding "was made under specific instructions not objected to here."

body a correct statement of the applicable law and should have been given, at least in substance.[5]

We see no merit in appellant's contention that plaintiff's testimony that something "gave way" on the Winisook causing him to fall should have been stricken.

For the reasons stated in the first part of our discussion we think the motion for a directed verdict should have been granted. Accordingly the judgment is reversed with directions to dismiss the complaint.

---

[5] Defendant's requests read as follows:

"1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeifer #2 prior to his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the Pfeifer #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the Pfeifer #2 expressly for the purpose of furthering the repair of the Pfeifer #2 in order to enable it to continue in navigation, your verdict must be for the defendant."

KAUFMAN, *District Judge* (dissenting):

I fully agree with the majority as to the insufficiency of the lower court's charge with respect to plaintiff's status at the time he was injured. On that ground, I would reverse and remand. However, the majority has gone further and directed a dismissal of the complaint and on this point I must regretfully dissent.

In effect, the court finds as a matter of law that the plaintiff was not injured in the course of his employment as a seaman or crew member. As the majority concedes this is a factual question and as such is properly left to the jury whose finding will not be disturbed if there is any evidence to support it. In my opinion there was sufficient evidence in this case to enable a jury to reasonably find that plaintiff was a seaman in the course of his employment at the time he was injured. See *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 (1958); *Butler* v. *Whiteman*, 356 U. S. 271 (1958); *Sinko* v. *LaCrosse Dredging Co.*, 352 U. S. 370 (1957).

I would therefore reverse and remand for a new trial.

Applicable Statutes

1. The Jones Act, Merchant Marine Act of 1920, Act of June 5, 1920, c. 250, g 33,41 Stat. 1007, Title 35 U. S. C. A., g 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *

Appendix

2. The Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. A. Sec. 901 *et seq.* provides as follows:

Sec. 902. Definitions.

When used in this Chapter—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Sec. 903. Coverage.

(a) * * * No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, * * *

Sec. 905. Exclusiveness of Liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * *

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted]32

CHRISTIAN F. BRÆEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT, PFEIFER OIL TRANSPORTATION COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

EDMUND F. LAMB,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT, PFEIFER OIL TRANSPORTATION COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

This is an action brought by the plaintiff to recover for personal injuries sustained by him on January 22, 1953, while attempting to proceed from a work barge permanently withdrawn from navigation called the *Winnisook* to a raft tied alongside thereof in order to affix deck planking upon the said raft. The plaintiff had been employed by the defendant as a mate on its barge *Pfeifer No. 2*. On the day prior to his injury, that barge had come to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. On the morning of the accident, plaintiff had worked aboard that barge for about an hour in dismantling the cargo pump. He was then ordered by defendant's Vice President in charge of repair work at the yard

to perform the carpentry work of completing the laying of the deck on the aforesaid raft. The reason therefor was that there were sufficient persons engaged in performing the repair of the pump on the *Pfeifer No. 2* and there was no occasion for the plaintiff to work aboard the vessel at that time. The work upon the raft had nothing whatever to do with the work which was being performed upon the *Pfeifer No. 2.* There was no issue of fact thereon. The plaintiff's testimony on the point is quoted in the decision of the Court of Appeals as Footnote 1 at page 16 of the appendix to the petition.

Although plaintiff's injury did not occur on board or in connection with the performance of any work upon or relating to the *Pfeifer No. 2* upon which he had been employed as a seaman, but arose out of and was related to work unconnected with that barge and having nothing whatever to do with a seaman's activities as a member of a crew of a vessel, plaintiff sought to maintain action under the Jones Act.

Motions had been made at the close of the plaintiff's case for dismissal of the complaint, at the close of the whole case for a directed verdict, and, after a verdict had been returned in favor of the plaintiff, for judgment n.o.v. Decision on the motion to dismiss at the close of plaintiff's case was reserved, and the motions for a directed verdict at the close of the entire case and for judgment n.o.v. were denied.

Upon appeal the majority of the Court below held that there was no evidence upon which the case could properly have been submitted to a jury for verdict under the Jones Act. The Court further unanimously held that even if there had been a jury question, the case was submitted to the jury under an inadequate and improper charge and that the District Court had erred in failing to charge the jury as

requested by the defendant (Petitioner's Appendix, pp. 18-21).

Contrary to the statements made by petitioner in his Statement Of The Case and in his Statement of Facts, the decision of this case did not turn, and was never urged to turn, upon any question of discharge of plaintiff from his employment aboard the *Pfeifer No. 2;* nor was there the slightest suggestion in the evidence as insinuated, though not stated, by petitioner (pp. 11-12 of Petition) that plaintiff at the time of his injury was using the barge *Winnisook* as a means of access from or ingress to the barge *Pfeifer No. 2.*

The Questions Presented.

The questions presented as stated in the petition do not present questions for review on petition for writ of certiorari under Rule 19 of this Court.

It can add nothing to the validity of the petition that a jury verdict was rendered in favor of the plaintiff, since it was rendered under an inadequate and insufficient and erroneous charge which failed to give the jury any basis whatever for a determination as to whether or not at the time of his injuries, the plaintiff was engaged in work as a member of a crew of a vessel and whether his injury arose out of his employment as a seaman as such engaged in the service of his ship (Petitioner's Appendix, pp. 19-20).

All that is presented in this case is whether or not under plaintiff's own proof, which is so conclusive (see Footnote 1, Petitioner's Appendix, pp. 16-17), plaintiff could, under any conceivable interpretation of the Jones Act, as limited by the Longshoremen's and Harbor Workers' Compensation Act (*Swanson* v. *Marra Bros.*, 328 U. S. 1), be entitled to a Jones Act remedy. By this petition this Court is being

requested to review the entire record in this case to ascertain whether it would, contrary to the judgment of the majority of the Court of Appeals, come to a different conclusion as to whether facts had been presented upon the trial from which a contrary inference could be drawn to that stated by the Court of Appeals.

There can be no question, and none has been raised, that the Court of Appeals was acting within its appropriate powers in granting judgment dismissing the complaint where a motion for judgment n.o.v. had been made in the trial Court. *Cone* v. *West Virginia Pulp & P. Co.*, 330 U. S. 212, *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, *Fountain* v. *Filson*, 336 U. S. 681 and *Johnson* v. *New York, New Haven & Hartford R. Co.*, 344 U. S. 48.

Reasons for Denying the Writ.

This petition, it is respectfully submitted, satisfies none of the criteria for review on writ of certiorari set forth in Rule 19 of the Rules of this Court.

There is set forth no showing that the writ presents any special and important questions for settlement by this Court. At most it presents a question of consequence only to the litigants in this case. Because of the very limited and narrow factual pattern involved, the case can have no possible general or important application in the field of law pertinent.

(1) There is no showing that the decision of the Court of Appeals is in conflict with the decision of another Circuit on the same matter.

(2) There is no showing nor even a suggestion that the Court of Appeals has decided an important question of Federal law which has not previously but should be settled by this Court.

(3) There is no showing that the Court of Appeals has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower Court.

(4) The only suggestion in the petition that the Court of Appeals decision is in conflict with the decisions of this Court, is the statement that since the plaintiff's duties as a seaman on board the *Pfeifer No. 2* had included making minor repairs to that barge, and the work which he was doing when he was injured involved the making of minor repairs, not to the barge *Pfeifer No. 2*, but to a raft, a question was presented under the decisions of this Court in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 and *Butler* v. *Whiteman*, 356 U. S. 271, as to whether plaintiff's injuries arose out of the performance of work as a seaman and a member of the crew of the *Pfeifer No. 2* (Petition, pp. 9-10); the contention being that under these cases "the duties of a man during the vessel travelling are relevant in determining whether he is a member of a crew while the vessel is anchored" (Petition, p. 9). The suggested conflict with these decisions is tenuous and strained; for here the plaintiff was not even working upon or in connection with his vessel, but was doing work entirely unrelated to the vessel upon which he had been engaged as a seaman, and the kind of repairs he was performing were not comprehended within the type of repairs which he had testified it was part of his duty to perform upon the vessel upon which he had been employed as a seaman.

There is no contrariness in principle indicated—and there is none—between the present decision and any of the cases cited by petitioner at pages 10 and 12 of the petition. The difference in result follows from the difference in the fact situation presented.

The Court of Appeals as authority for its decision dismissing the complaint in the present case, has relied upon the decisions of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137, *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340, *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 371 (Footnote 2, p. 17, Petitioner's Appendix), *Swanson* v. *Marra Bros.*, 328 U. S. 1, (p. 17, Petitioner's Appendix) and *Norton* v. *Warner Co.*, 321 U. S. 565 (Footnote 3, p. 18, Petitioner's Appendix), as well also as upon the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 (p. 18, Petitioner's Appendix).

There is no suggestion in the petition that the Court of Appeals misinterpreted, misunderstood or misapplied the rules enunciated by this Court in those cases. Indeed, the petition here, except for the formal requirements of Rule 23, is but a repetition of the arguments made in the Court of Appeals upon which petitioner failed to prevail, and is in the nature of an appeal, as if this Court were a Court of Errors,and Appeals in the same sense as the highest State Courts.

Conclusion.

For the reasons above stated, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, ~~1958~~ 59

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1958

No. 706

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF FOR PETITIONER

Opinions of the Court Below

There was no opinion by the District Court (Eastern District of New York). The opinion of the United States Court of Appeals, for the Second Circuit, by Swan, C.J., concurred in by Moore, C.J., Kaufman, D.J. dissenting, is reported in 263 F. 2d 147. It is printed at pages 70-76 of the record.

Jurisdiction

The jurisdiction of this Court is based on 28 U. S. C. A., Section 1254 (1), which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to a civil case after rendition of judgment.

After a jury trial, there was a District Court judgment in favor of the petitioner in an action brought pursuant to the Jones Act, 46 U. S. C. A. §688. The judgment was reversed and the complaint dismissed by the United States Court of Appeals for the Second Circuit on January 23, 1959 (R. 76).

Judgment pursuant to the reversal was entered on January 23, 1959. Within ninety days, on February 18, 1959, a petition for certiorari was filed. Certiorari was allowed by order dated March 30, 1959, the case being transferred to the summary calendar (R. 76-77).

Statutes Involved

1. The Jones Act, 46 U. S. C. A. §688, which provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *"

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, *et seq.*, which provides:

Sec. 902. Definitions.

When used in this Chapter—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Sec. 903. Coverage.

(a) * * * No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, * * *

Sec. 905. Exclusiveness of Liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * *.

3. 28 U. S. C. A., Section 2111, which provides:

"On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record, without regard to errors or defects which do not affect the substantial rights of the parties."

Questions Presented

1. Where in a Jones Act case a jury has found that the injured, a conceded seaman and member of a crew when ordered by his employer to do work, was hurt in the course of such employment when doing that work so as to be entitled to his remedies under the statute, and the District Judge has denied motions to set the verdict aside and for judgment n.o.v., was there that complete absence of probative facts to support the conclusion reached by the jury which empowered the Court of Appeals to overturn the jury findings on the issues and itself direct final judgment against him?

2. If the Court of Appeals erred in holding that there was no question of fact as to the status of the petitioner at the time he was injured, should the case be remanded for a new trial because of alleged deficiencies in the District Court's instructions to the jury on that issue, or is the petitioner entitled to a reinstatement of his District Court judgment on the ground that the errors, if any, were harmless and did not affect substantial rights (28 U. S. C. A., Section 2111)?

Statement of the Case

The defendant, Pfeifer Oil Transportation Company, was in the business of transporting petroleum products; in the conduct of that business it used barges and tow boats (R. 45). Braen, the petitioner, was a seaman who had Coast Guard ratings as a Chief Cook, and Chief Steward (R. 19). He also had a Barge, Tankerman's certificate (R. 19).

Braen had been employed by defendant as a mate aboard its barge, the Pfeifer No. 2, for about four months

prior to January 22, 1953 (R. 18-20, 39). There were three men to the crew (R. 19). The union contract called for an eight-hour day (R. 19). The arrangement on the Pfeifer was that two men would work twelve hours a day so that one man would always be off (R. 19).

As of January 22, 1953 Braen had been working aboard the Pfeifer twelve hours a day for two weeks (R. 61). He testified to his duties:

> "My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel: it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.
>
> We handled the hose for the loading and the unloading of the cargo, which we refer to as the cargo hose, and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things like that; and minor repairs, repairs that we could handle between the two men aboard the barge." (R. 19)

The Captain of the Pfeifer No. 2 testified to the same effect (R. 39).

Braen was protected in his status by the union contract (R. 19, 68). This contract provided that a member of the crew of a vessel operating more than 48 consecutive hours could not be laid off except on three days' notice after the vessel was moored in her berth (R. 68, 69). The contract also protected the employer, providing that if a member of the crew quit his job without giving three days' notice of his intention to leave, he forfeited three days' pay to the employer (R. 69).

A day or two before the accident, one of the Pfeifer's pumps became out of order (R. 20). Accordingly, the vessel was ordered to defendant's repair yard at West New Brighton, Staten Island, where it arrived on January 21, 1953 (R. 20, 21).

Among the facilities maintained by defendant for the repair of its vessels at the West New Brighton Yard was a floating barge, the Winisook (R. 26, 33, 34, 45, 50; Ex. 2 at R. 50, Ex. B at p. 58), secured to the dock by lines and cables (R. 39, 42, 50).

The space between the Winisook and the dock was occupied by a floating raft (R. 23, 24), depicted in the exhibits at pages 60 and 62 of the record. It was held in place by a line attached to the Winisook (R. 61).

The purpose of the raft, owned by defendant (R. 46), was to facilitate chipping, painting and welding work on such of its vessels as required those procedures (R. 27, 65). When the raft would be so used in connection with the barge, Braen would help out (R. 27).

New decking was being installed on the raft and on January 22, 1953, about three-quarters of the decking had been completed (R. 23, 35, 48).

When the Pfeifer No. 2 arrived at West New Brighton it was moored to adjoin the open water side of the Winisook (Ex. 1 at p. 55).

In order for the crew of the Pfeifer No. 2 to leave or board it, they had to go by way of the Winisook, utilizing a planked ledge or catwalk that ran around its sides (R. 59-60, 62, 66, 67). In other words, the catwalk of the Winisook was a necessary means of passage getting off the Pfeifer No. 2, whatever the purpose.

The catwalk had been in bad shape for a long time, splintered and worn (R. 60). Complaints had been made to those in authority but nothing had been done about it (R. 61).

When the Pfeifer was moored on January 21, Braen and the captain began work on disassembling the defective pump (R. 21, 64-65). Work ceased at approximately 4:00 o'clock to be resumed the next morning at 8:00 o'clock

(R. 29-30). In the interval, Braen ate and slept aboard the Pfeifer (R. 21).

Next morning, Braen resumed work at about 8:00 o'clock (R. 23). The intention was to work until 4:00 o'clock unless the boat went out prior to that time (R. 29). It was anticipated that the Pfeifer would probably leave that day (R. 65).

Shortly after Braen resumed work, Edward Smith, the over-all repair boss for the defendant, appeared aboard (R. 23, 46). He told Braen that there was too much help on the one job and directed Braen to "finish putting this top deck of planks on this raft over here so that we can use it. Get this job done" (R. 23).

The nature of the conversation between Smith and Braen was in dispute. Smith testified that he told Braen that the latter had to be laid off; that he offered Braen an opportunity of one or two days' work, decking the raft; that Braen accepted the invitation (R. 46). This alleged lay-off was categorically denied by Braen (R. 70). It was this purported lay-off that bottomed the employer's contention during the trial that at the time of his injury Braen was not a member of the crew but a shipyard carpenter.

Suffice it to say, on this aspect of the case, that it was for the jury to decide what the conversation had been. It is undisputed that the three days' notice of lay-off required by the contract was never given.

In obedience to Smith's order, Braen collected materials to work on the raft and placed them at a door of the Winisook (R. 24). He then went about releasing a line from the bitt on the Winisook so as to pull the raft up opposite the door, he was going to secure it there (R. 24). As he was doing so, necessarily standing on the Winisook's catwalk, a part of it suddenly gave way and he was

thrown to the raft sustaining serious personal injuries (R. 24-26, 62).

Defendant had paid Braen cure and maintenance for the injuries so sustained (R. 61-62).

ARGUMENT

POINT I

Braen sustained his injury in the course of his employment as a seaman and a member of the Pfeifer's crew. At the very least, the issue was one of fact for the jury.

The Court of Appeals has stated that Braen's testimony as to the nature of the services he had been ordered to perform and was about to perform when the accident happened, established, as a matter of law, that Braen was not injured in the course of his employment as a seaman *or* as a member of the crew of the Pfeifer No. 2 (R. 73-74). It is not clear what the Court intended to convey by its use of the disjunctive "or". The implication is that Braen was not injured in the course of his employment as a seaman, or if injured as a seaman, he was not injured in the course of his employment as a member of the crew. Neither premise is tenable.

That Braen was not injured in the course of his employment as a seaman

The existence of a question of fact as to the status of an injured maritime worker, whether a seaman or not, usually arises when one, not in general employ as a seaman, seeks to assume the mantle of one in order to gain

the benefits of the Jones Act. In such a case, the man's activities serve to define whether he is a seaman or not.

If the work he is doing at the time of injury is traditionally performed by a seaman, or is calculated to further the mission of the vessel, the jury may find that he is a seaman at the time of the injury. *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 2 L. Ed. 2nd 737; *Butler* v. *Whiteman*, 356 U. S. 271, 2 L. Ed. 2d. 754; *Gianfala* v. *Texas Co.*, 350 U. S. 879, 100 L. Ed. 775; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 84 L. Ed. 732; *Wilkes* v. *Mississippi River Sand & Gravel Co.* (C. A. 6), 202 F. 2d 383; *Gahagan Construction Corp.* v. *Armao* (C. A. 1), 165 F. 2d 301; *Summerlin* v. *Massman Construction Co.* (C. A. 4), 199 F. 2d 715; *Offshore Co.* v. *Robison* (C. A. 5), 266 F. 2d 769. In the cited cases the injureds, although employed in such diversified capacities as members of a drilling crew on a submersible barge, a fireman on a derrick, a common laborer or deckhand on a dredge, were held to be seamen because they did work that seamen do to accomplish the vessel's mission.

If the work that the injured is doing is customarily performed by shore personnel then the injured is not a seaman. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 96 L. Ed. 205.

There is no such issue here. This is not a case of one, not overwise a seaman, claiming to have become one for a particular time in order to come within the purview of the Jones Act. There is no question that at 8:00 o'clock in the morning of January 22, 1953, Braen was not only a seaman, but had been so employed aboard the Pfeifer No. 2 for some four months before.

What is it that happened between 8:00 o'clock and 9:00 o'clock to alter Braen's status as a seaman so as to vitiate the duties owed to him and divest him of the rights he had as such?

It could not be the alleged lay-off. Not only was the lay-off denied, it was precluded by the contract provisions which created and preserved Braen's status. *The Buena Ventura* (D. C. S. D. N. Y.), 243 F. 797, 800; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 313; *DeLuca* v. *Red Salmon Canning Co.*, 2 Cal. App. 2d 124, 37 P. 2d 704. In any event, defendant has conceded both in its briefs below and in its opposition to Braen's petition, that the alleged lay-off was not a factor in its contentions.

Was it that the accident happened aboard the Winisook rather than on the Pfeifer itself? This is of no moment. The duties owed by the defendant in respect to the maintenance of the Winisook were the same as the duties owed by it with respect to the Pfeifer No. 2. As pointed out in the statement of the case, it was conceded that the catwalk of the Winisook was a necessary means of passage from and to the Pfeifer. Accordingly, the Winisook is to be deemed as a part of the Pfeifer equipment with respect to which the defendant owed to its seamen the obligation of reasonable care. *Alaska Steamship Co.* v. *Petterson*, 346 U. S. 914, 98 L. Ed. 410; *Standard Oil Co.* v. *Robins Dry Dock* (C. A. 2), 32 F. 2d 182; *Marceau* v. *Great Lakes Transit Corp.* (C. A. 2), 146 F. 2nd 416, cert. denied 324 U. S. 872.

That the Pfeifer No. 2 was not in transit at the time of the accident is, of course, an irrelevance. The Pfeifer, ready to leave the same or next day, was a vessel in navigation, even though at the time of the accident repairs were being made. *Hunt* v. *United States*, 17 F. Sup. 578, aff'd (C. A. 2), 91 F. 2d 1014, cert. denied 302 U. S. 752; *Carumbo* v. *Cape Cod Steamship Co.* (C. A. 1), 123 F. 2d 991, 995.

Was it that the injuries occurred when Braen was about to do decking of a raft—work that involved carpentry? If that was the basis of the decision (R. 72) it was

clear error. Seamen have been handling carpentry tools as part of their duties since the Phoenicians plied their triremes along the shores of the Mediterranean. A ship's carpenter is a seaman even when he is doing his work while the vessel is in drydock. *Rogosich* v. *Union Drydock & Repair Co.* (C. A. 3), 67 F. 2d 377, 378; *Kuhlman* v. *W. & A. Fletcher Co.* (C. A. 3), 20 F. 2d 465, 468.

The above constitutes all the factual changes between 8:00 o'clock in the morning, when Braen was a conceded seaman, and the time when the accident happened, an hour or so later. They cannot possibly found a holding that when Braen was hurt, his injury was not in the course of his work as a seaman in defendant's employ.

That Braen was not hurt in the course of his employment as a member of the crew

It is not to be denied that at 8:00 o'clock in the morning on the day of the accident, Braen was not only a seaman but was also a member of the Pfeifer's crew, and that he had been such a member for four months before.

If the Court of Appeals meant that Braen was no longer a member of the crew when injured, then what we have said about Braen's alteration of status as a seaman after 8:00 o'clock applies with equal force to any argument that his status as a member of the crew had been changed when he was injured.

We will demonstrate in a subsequent portion of the brief that since Braen was a member of the crew when ordered to do the work during the performance of which he was injured, and since his status had never changed, the "nature of the service" he was ordered and about to perform is irrelevant to the applicability of the Jones Act. Assuming, at this time, that the nature of the services Braen was ordered to do is relevant to the issues, then,

there was ample evidentiary basis for the jury's finding that Braen was injured in the course of his employment as a member of the crew.

The rule was stated in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373, 1 L. Ed. 2d 404, as follows:

> "* * * [T]he duties of a man during the vessel's travel are relevant in determining whether he is a member of the crew while the vessel is anchored."

As a seaman aboard the Pfeifer, Braen's duties included maintenance, painting, chipping, scraping and minor repairs. Minor repairs were precisely what he had been ordered to do and was about to do when injured.

The Court of Appeals has noted that the raft Braen was about to work on pursuant to the orders of his employer, was not intended to be used and was not used in repairing the cargo pump of the Pfeifer No. 2 (R. 71-72). If that was the basis of decision, it was error. Smith testified that the raft was not intended to be used in connection with Pfeifer No. 2 "*at that time*" (R. 48). The wording certainly betokens that somewheres along the line the raft was going to be used in connection with the Pfeifer No. 2. The record shows that when so used, Braen would help out.

For the Jones Act to be applicable it is not necessary that the work during which injury occurs be then and there connected with the navigation of the vessel. *Hunt* v. *U. S.*, 17 F. Sup. 578, aff'd (C. A. 2), 91 F. 2d 1014, cert. denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271.

In the *Hunt* case, plaintiff was injured while painting rust spots in the hold while the vessel was in drydock undergoing repairs that would take two or three weeks to accomplish. The Court held that plaintiff was a member of the crew entitled to his remedy under the Jones Act even though he had not signed ship's articles.

In the *Butler* case, a tug was undergoing rehabilitation preparatory to a coast guard inspection, presumably in anticipation of a return to service. During the period of the tug's inactivity decedent was employed as a laborer doing odd jobs on defendant's wharf. At the time of the accident, plaintiff was on his way to the tug in order to clean its boilers. It was held that whether plaintiff was a seaman and member of the crew entitled to a Jones Act remedy was for the jury.

The proof is much stronger for Braen than it was for the plaintiff in the *Senko* case. In that case, the deceased, a handyman, was killed by the explosion of a coal stove while placing signal lanterns from the dredge in a shed on a neighboring bank. The Court pointed out that if the dredge were in transit, the jury "could believe" that his duty would require him to clean navigation lights; that if the dredge leaked, the jury "could suppose" that his job would be to repair the leak. It held that this was enough to create a question of fact as to Senko's status as a member of the crew at the time of his injury. Here, if the Pfeifer required painting or minor repairs, the jury did not have to suppose that Braen would do the work—that was his conceded duty. The jury would not have to suppose that the raft would be used for that kind of work—that was testified to without contradiction. Certainly in making the raft fit for such use, Braen was engaging in activity that was in the service of his vessel, he was acting as a member of the crew—at least a jury with full propriety could so find.

The position that a party takes prior to a trial with respect to an issue is probative of that issue when denied at the trial. *Pekelis* v. *Transcontinental & Western Inc.* (C. A. 2), 187 F. 2d 122; cert. denied 341 U. S. 951.

Defendant had paid Braen maintenance and cure for the injuries sustained in the accident. The remedy of an

employee encompassed by the Longshoremen's & Harbor Workers' Act and the remedy of a member of a crew for maintenance and cure are mutually exclusive, *Norton* v. *Warner Co.*, 321 U. S. 565, 570; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 311. Accordingly, the payment to Braen of maintenance and cure can be regarded in the nature of an admission on defendant's part that Braen had sustained his injuries in the course of his employment as a member of the crew.

The above evidence, therefore, comprises a sufficient nexus of probative facts from which a jury could find that Braen's injury occurred in the course of his employment as a seaman and a member of the crew so as to preclude the Court of Appeals from nullifying the jury finding to that effect and itself directing final judgment to the contrary. On the very face of it, there was not that absence of probative facts which empowers a Court of Appeals itself to decide an issue which is fundamentally for the jury.

The nature of Braen's services when injured is irrelevant to his right to a remedy under the Jones Act.

It is further demonstrable that on the facts of this case, defendant, in succeeding to have the issue of Braen's status at the time of the accident passed on by the jury, obtained more than it was entitled to.

Members of a crew do not cease to be such nor do they lose their rights as such because put to work that is ordinarily done by non-members of a crew, such as mechanics, or repairmen, or cleaners, or stevedores. *Maryland Casualty Company* v. *Lawson* (C. A. 5), 94 F. 2d 190; *Carumbo* v. *Cape Cod Steamship Co.* (C. A. 1), 123 F. 2d 991; *De Luca* v. *Red Salmon Canning Co.*, 2 Cal. App. 2d 124, 37 P. 2d 704. In the latter case, where it was claimed by the

defendant that the injured, doing stevedoring work, was relegated to his remedy under the Longshoremen's and Harbor Workers' Act, the Court wrote:

> "Plaintiff signed the shipping articles as a member of the crew and was ordered into the hold of the vessel to unload the cargo. He was still a member of the crew and was performing these labors under orders of his superiors in the vessel; and while so engaged received the injury complained of in the regular course of his employment. The action therefore falls under the provision of the Jones Act."

There is nothing in the Jones Act or in the Longshoremen's and Harbor Workers' Act which declares that the right of one who *is* a seaman and a member of a crew to a remedy under the Jones Act is dependent on the nature of the services performed when injured. The plain intent of the Jones Act is that so long as what the seaman is doing at the time of his injury is in the course of his employment, he is entitled to his remedy under it. *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

The irrelevance of the "nature of the duties" to the question of the applicability of the Jones Act when the injured is a seaman and a member of the crew hurt in the course of his employment is illustrated by the following:

In *Marceau* v. *Great Lakes Transit Corp.* (C. A. 2), 146 F. 2d 416, cert. denied in 324 U. S. 872, defendant's vessel was moored at a dock. Plaintiff left the vessel on shore leave for personal business and recreation. On his return he walked up the dock towards the boat and approached a ladder belonging to the ship which led to the dock. The ladder was a recognized mode of egress from and ingress to the ship for the crew. When he was within five feet of the ladder he slipped and fell, sustaining injuries. There had been a pile of flour or meal deposited near the foot of

the ladder which had become slippery. The Court wrote (p. 418):

> "The plaintiff was acting under orders when he returned to the ship. Consequently, at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee and over which the plaintiff had to pass in order to return to his work. Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property, if approaching by a customary route."

In *Wong Bar* v. *Suburban Petroleum Transport* (C. A. 2), 119 F. 2d 745, plaintiff was injured while he was leaving the vessel after having been told that no work was required of him and that he was free to go home. The Court held the plaintiff was entitled to his remedy under the Jones Act because

> "the employee continues in the course of his employment until he has left his place of employment; hence, in leaving the tugboat Seabrook and Wong Bar were acting in the course of their employment".

If Braen had been leaving the Winisook in order to go ashore on some personal errand, or because he had been told to take the day off, and while doing so had been hurt because the catwalk of the Winisook collapsed under him, he would, under the cited authorities, have a remedy under the Jones Act. It is impossible to believe that when the same injury occurs while doing work, or preparing to do work, that he had been directed by his superiors to do, he is not entitled to his remedy under the Jones Act. If at the moment that Braen was about to descend to the raft, he had been recalled to fix the pump and the accident occurred then, even defendant would concede its liability.

To make the broad remedial provisions of the Jones Act depend on a segmentation of conduct that is here indulged in is unthinkable.

Nor is anything in the Longshoremen's and Harbor Workers' Act which provides or permits any narrowing of the Jones Act remedy as here contended.

The exclusionary provisions of the Longshoremen's and Harbor Workers' Act are plain and clear. Section 903(a)(1) provides that no compensation shall be payable in respect to disability or death of a master or member of a crew of any vessel. That is all. There is not a word in the statute so much as suggesting that only certain members of a crew are within the exclusionary clause, *viz.*, those injured in the service of the vessel, or those doing a certain type of work. The exclusionary clause is all embracing —members of a crew—without limitation, without circumscription, without modification.

Patently, therefore, if an injured man is a member of a crew, no matter what may be his activities at the time of injury, so long as they are in the course of his employment, the Longshoremen's and Harbor Workers' Act in terms does not apply. The purpose of the Act makes that clear.

Prior to the passage of the Longshoremen's and Harbor Workers' Act in 1927 the remedies available to longshoremen for injuries sustained in the course of their work was limited. By reason of their employment, they could not turn to state compensation laws; the Jones Act was not available to them since the owners of the vessels were not their employers. Other than a claim against the vessel for injuries caused by unseaworthiness, longshoremen had no remedies. The Act was passed to fill this gap in their remedies. It was never intended to affect or limit in the slightest the traditional rights and remedies of seamen, members of a crew. *Parker* v. *Motor Boat Sales*, 314 U. S.

244, 249, 86 L. Ed. 184; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 311; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 351; *Swanson* v. *Marra Bros.*, 328 U. S. 1, 90 L. Ed. 1045.

In holding that the plain language of the Longshoremen's & Harbor Workers' Act that crew members are not within its coverage does not mean what it says, but means that only such members of a crew are excluded from coverage as were injured in the service of their vessel, or as were doing a certain type of work, the Court of Appeals was engaging in an unwarranted amendment of the act rather than an interpretation of it.

When a seaman and member of a crew engages in an activity that his superior has ordered him to do, and is injured in that work, he is injured in the course of his employment as a seaman and a member of the crew. Then and there he is entitled to his Jones Act remedy.

> "Coverage of the Jones Act depends *only* on the finding that the injured was an employee of the vessel engaged in the course of his employment at the time of his injury." (Emphasis supplied.)
>
> *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

That is this case.

POINT II

Pursuant to U. S. C. A. Section 2111, petitioner is entitled to a restatement of his District Court judgment.

If we are correct in our contentions, what remedy is Braen entitled to from this Court? The Court of Appeals has stated that if it was in error in holding that no question of fact was presented, it would reverse in any event and order a new trial because of the District Court's failure to charge certain of defendant's requests (R. 74-75).

Assuming, *arguendo*, that the requests to charge properly stated applicable propositions of law (it will be demonstrated that they did not), we submit that no substantial rights were affected by the refusals to charge and that accordingly, the errors, if any, should be disregarded.

The general rule is that while misdirection is error, non-direction is not. Thompson on Trials, Section 2346. The English courts hold that

> "non-direction is only a ground for granting a new trial where it produces a verdict against the evidence."
>
> *Great Western Railway* v. *Fawcett*, 8 Law T. 31.

The requests to charge dealt with Braen's activities at the time of the injury on the theory that they affected his status. We have shown that on the facts of this case, defendant's having the issue submitted to the jury was more than it was entitled to. We have shown, assuming the issue was for the jury, that the evidence was such as to make a finding that Braen was not injured in the course of his employment as a seaman and a member of the crew against all the evidence. Accordingly, the refusals to charge did not and could not affect any substantial rights of the de-

fendant. 28 U. S. C. A., Section 2111 therefore applies and petitioner is entitled to a reinstatement of his judgment.

In any event, there was no error in the refusals to charge.

Request No. 1—"The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeiffer No. 2 prior to his injury, does not entitle him to maintain this action against his employer." (R. 10-11)

This request, as phrased, stated no proposition of law that would help the jury to determine whether Braen was injured in the course of his employment as a seaman, a member of the crew. The words "does not entitle him to maintain this action" did not convey to the jury what defendant presumably had in mind—a definition of seaman and member of a crew. From a jury standpoint the request was without meaning.

Counsel might as well have requested a charge that merely because plaintiff had coast guard papers or had a certificate as a tank man or was a member of a seamen's union, did not mean that he was entitled to maintain this suit. The request clarified no issue. The claim of error in refusing to charge the request is, therefore, without substance, particularly since Braen's duties had been made a test of his being a member of the crew (R. 5, 10).

There was no suggestion by the charge or otherwise that Braen was a seaman and member of the crew at the time of the accident merely because he had been a seaman and member of the crew; there was no need for a request of this kind.

Request No. 2—"It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit." (R. 11)

What we have said about the verbiage used in request No. 1 applies with equal force to this request. In addition, it was so general and abstract in its language as to be meaningless—it explained nothing. Moreover, the thought behind it was substantially charged (R. 5). Accordingly there is no error for not using defendant's phraseology. *Ayers* v. *Watson*, 137 U. S. 584, 601, 34 L. Ed. 803; *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, 24 L. Ed. 403.

Request Nos. 3 and 4 (R. 11)—These requests made furtherance of navigation of the Pfeiffer No. 2 as the conclusive tests of the applicability of the Jones Act.

"Navigation", in law, is a word of art. It encompasses many different activities quite divorced from the lay understanding of the word—the act or science of laying out a ship's course and keeping on it. In law, such diverse services as those of a cook, a bartender, a telephone operator, a musician, to name but a few, are considered part of navigation. Norris, *The Law of Seamen*, Section 651. A jury could not be expected to know that. As phrased, therefore, the requests not only did not clarify any issue but would serve to confuse and mislead.

> "The test for the correctness of an instruction does not lie in the indulgence which a lawyer in his office with the aid of his books, or the trial and appellate

courts with the benefit of briefs and arguments of counsel, give to instructions, but as to how the instructions will naturally be understood by the average men composing juries."

Government Employees Insurance Company v. *Davis* (C. A. 5), 266 F. 2d 760, 765, citing 88 C. J. S. Trial, Sec. 338, pp. 894, 895.

Moreover, as phrased, the requests could lead the jury to believe that unless Braen's work then and there furthered navigation of the vessel, he was out of court. That, as has been demonstrated, is not the law.

The requests, not embodying a clear and full statement of applicable law, were properly refused.

CONCLUSION

The judgment of dismissal should be reversed and the District Court judgment reinstated.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 706.

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT.

Questions Presented.

This case involves the question whether a man who had been employed as a crew member of a barge, who sustains an injury while in the course of performing work as a carpenter having no connection with or relation to the barge upon which he had been employed, may recover damages for such injury in a suit under the Jones Act or whether his exclusive remedy against his employer is under the Longshoremen's and Harbor Workers' Compensation Act.

There is no dispute as to the nature of the work which the petitioner was in the course of performing at the time he sustained his injury—completing the carpentry work in laying a deck on a work raft. Neither is there any dispute as to the manner of the happening of the injury—by falling from the permanently moored work barge *Winisook* to the work raft which was located alongside at respondent's repair yard.

inference under the evidence that an injury so occurring arose out of and in the course of the employment of the petitioner as a seaman and member of the crew of the barge *Pfeifer No. 2.* If there was no evidence from which such an inference could permissibly have been drawn, there can be no doubt that the Court of Appeals acted within its appropriate powers in granting judgment dismissing the complaint. The respondent had reserved its position by motion to dismiss at the close of plaintiff's case (R. 43-44), by motion for a directed verdict at the close of the trial (R. 52-54), and by motion for judgment n.o.v. under Rule 50(b) of the Rules of Civil Procedure.

The fact that the petitioner obtained a jury verdict adds no particular strength to his position. This Court did not hesitate in the recent past to affirm a Circuit Court which reversed a judgment entered in favor of a plaintiff upon a jury's verdict where the facts did not warrant recovery under the Jones Act. *Desper* v. *Starved Rock Ferry Co.* (1952), 342 U. S. 187.

Only if there was evidence giving rise to a permissible inference that plaintiff's injury arose out of and in the course of his employment as a seaman and member of the crew of the *Pfeifer No. 2* does the subsidiary question arise whether the District Court's charge to the jury adequately and properly instructed the jury as to the tests to be applied by them in determining the issue of fact upon the resolution of which petitioner's right to maintain an action under the Jones Act depended. As to this subsidiary issue the Court of Appeals was in unanimous agreement that the charge was inadequate and insufficient in failing to give the jury any test for determining whether the Jones Act was applicable to the plaintiff or not, and in failing to charge defendant's requests at least in substance (R. 74-75).

In petitioner's Statement of the Case it is said that an alleged lay-off of the petitioner "bottomed the employer's contention during the trial that at the time of his injury Braen was not a member of the crew but a shipyard carpenter" (p. 7, Petitioner's Brief). This statement is inaccurate, as is later in effect admitted by petitioner when he concedes that respondent, both in its briefs in the Court of Appeals and in its brief in opposition to the petition for certiorari, has denied that the alleged lay-off was a factor in respondent's contentions (p. 10, Petitioner's Brief).

Reference to the motion to dismiss at the close of plaintiff's case (R. 43-44) and the motion for a directed verdict at the close of the trial (R. 52-54) will show that respondent did not make any contention, even at the trial, that this alleged lay-off was a determinative factor in the case.

By reference to the alleged lay-off petitioner seeks to interject an irrelevant fact issue to escape the very simple question which is involved—whether the nature and character of the work, in the course of performance of which petitioner sustained his injury, affords petitioner a right of action under the Jones Act.

The union contract upon which stress is placed by petitioner (p. 5, Petitioner's Brief) was introduced in evidence by the petitioner in rebuttal (R. 68-69), obviously to contradict the testimony of Edward Smith that he had told Braen on the morning of the accident that he would have to lay him off (R. 46); but this side issue is completely immaterial to the case. All that it has the effect of proving is that petitioner could have refused to do the requested work.

As above pointed out, there is no dispute as to the nature of the work which the petitioner was in the course of per-

forming when his injury was sustained. On the day of the accident, there being more persons engaged aboard the *Pfeifer No. 2* in performing the repair of its pump than were necessary for the job, Edward Smith, a vice president of the respondent in over-all charge of the repair yard, requested petitioner, who had formerly been a carpenter, to finish placing a deck on a raft which was used by the respondent in performing repair work on its vessels (R. 23). The petitioner undertook to do this work and after gathering the necessary tools and equipment proceeded out along the catwalk of the work barge *Winisook* (R. 24) and while attempting to bring the raft in a position where he could board it, fell from the *Winisook* onto the raft (R. 25-26). The work barge *Winisook,* which was in fact a covered lighter, was in effect a floating workshop containing machinery and equipment used in connection with the repair work performed by respondent at the yard where it was located (R. 47-49, 50). The vessel upon which petitioner had been employed as a seaman and member of the crew was the *Pfeifer No. 2* (R. 18-19). Concerning these facts there is no dispute whatever.

There was no evidence whatever in the case that the raft was at the time being used or intended to be used in connection with the work being performed on the *Pfeifer No. 2.* In fact the only evidence on the subject is to the contrary (R. 48).

There is no evidence in this case that the petitioner had ever worked on the raft in connection with making any repairs to the *Pfeifer No. 2.* The only evidence is that when the raft had previously been used in making repairs to the *Pfeifer No. 2,* the petitioner as a member of the crew of the *Pfeifer No. 2* had maintained a lookout on the *Pfeifer No. 2* to protect the workmen on the raft (R. 27).

That the crew of the *Pfeifer No. 2* had to cross the work barge *Winisook* in order to get ashore, since the *Pfeifer No. 2* was moored on the off-shore side of the *Winisook* (p. 6, Petitioner's Brief), is completely irrelevant to the question under consideration; since admittedly petitioner was not using the *Winisook* as a means of egress from or ingress to the *Pfeifer No. 2* at the time of his injury.

ARGUMENT.

POINT I.

Under the undisputed facts of the present case, as a matter of law, the plaintiff was not entitled to maintain suit under the Jones Act.

The Longshoremen's and Harbor Workers' Compensation Act, which was enacted by Congress in 1927, restricted the operation of the Jones Act to a seaman who is "either a master or a member of a crew of the vessel, injured in the course of his employment as such." *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 5.

After the enactment of the Jones Act, this Court in *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, had held that the Jones Act extended to maritime workers, including stevedores, who traditionally perform the work of seamen, when injured in the course of their employment. As pointed out in the *Swanson* case, within six months after the decision in the *Haverty* case, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, which made exclusive of all other liability of the employer of maritime employees for injuries sustained by such employees on navigable waters in the course of their employment, a liability to pay compensation. The

only maritime employees excluded from the coverage of the Compensation Act, were masters or members of a crew of a vessel. This Court in the *Swanson* case, interpreted the provisions of the Longshoremen's and Harbor Workers' Compensation Act as modifying the Jones Act so as to restrict the benefit of the Jones Act to either a master or a member of a crew of a vessel injured in the course of his employment as such, concluding, after an analysis of the provisions of the Compensation Act, as follows (328 U. S. at pp. 7, 8):

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters * * *. And it leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board (citing cases), or on shore. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. ed. 596; 63 S. Ct. 488, *supra*." (Matter in parentheses supplied.)

In *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, cited in the above quotation, this Court had occasion to consider the right of a member of a crew to recover under the Jones Act for an injury sustained ashore, and held that the right existed despite the place where the injury was inflicted, because of the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters. That the decision was so limited is apparent from the language of the Court in that case; and the decision was so interpreted by this Court in the *Swanson* case (328 U. S. at p. 4).

Thus the Court said in the *O'Donnell* case (318 U. S. at p. 42):

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring *v.* Clarke, 5 How (US) 441, 12 L. ed. 226, and New England Mut. M. Ins. Co. *v.* Dunham, 11 Wall. (US) 1, 20 L. ed. 90, supra.

"It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. Pacific S.S. Co. *v.* Peterson, 278 U. S. 130, 73 L. ed. 220, 49 S. Ct. 75, supra. Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. Cf. Jackson *v.* The Magnolia, 20 How. (U. S.) 296, 15 L. ed. 909; The Belfast, 7 Wall. (U. S.) 624, 640, et seq., 19 L. ed. 266, 270; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 S. Ct. 840, *supra*."

Whether or not an employee, the nature of whose work is such as to characterize him as a seaman, is or is not a master or member of a crew of a vessel excluded from coverage under the Longshoremen's and Harbor Workers' Compensation Act and entitled to maintain suit under the

Jones Act, may be at times a question of fact and at other times a question of law. Compare, *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251 and *Norton* v. *Warner Co.,* 321 U. S. 565.

The determination as to whether or not a maritime employee who may generally be classified as a seaman, in respect of an injury sustained in the course of his employment, is limited to compensation or may recover indemnity under the Jones Act has been uniformly held to depend upon the nature of the service being performed at the time the injury is sustained. *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128; *Desper* v. *Starved Rock Ferry Co.,* 342 U. S. 187; *Pennsylvania R. Co.* v. *O'Rourke,* 344 U. S. 334.

Neither the definition of the terms "master" or "seaman" as given in other statutes nor the designation given to the employee by his employer, has any relevancy. *Warner* v. *Goltra,* 293 U. S. 155, 160-161; *South Chicago Coal & Dock Co.* v. *Bassett, supra,* at p. 260.

In *Nogueira* v. *New York, N. H. & H. R. Co., supra,* this Court held that a railroad freight handler, who otherwise would have had a right of action under the Federal Employers' Liability Act, and who at the time of his injury was loading freight into railroad cars upon a carfloat attached to a dock, was by virtue of the Longshoremen's and Harbor Workers' Compensation Act limited to the recovery of compensation; for the reason that the Longshoremen's and Harbor Workers' Compensation Act in respect of injuries occurring on navigable waters to employees engaged at the time of injury in maritime employment, superseded and overrode the provisions of the Federal Employers' Liability Act. The Court specifically pointed out that:

"The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress" (281 U. S. at p. 137).

In *Desper* v. *Starved Rock Ferry Co., supra,* the Court had before it a case involving the death of a man who was killed aboard a moored barge maintained by the respondent as a machine shop, engaged in painting life preservers for use on a small fleet of sight-seeing motor boats. The evidence disclosed that the decedent had an operator's license from the Department of Commerce and had during the prior season been employed as a boat operator; he was to resume his operator's duties when the boats were back in the water. This Court, in affirming the Court of Appeals for the Seventh Circuit, which had reversed a judgment entered in petitioner's favor in the District Court on a jury's verdict, pointed out that the test whether the Jones Act applies to a seaman's injury "depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury" (342 U. S. at p. 190).

In *Pennsylvania R. Co.* v. *O'Rourke, supra,* this Court again emphasized that it is the particular activity in which the injured man is engaged at the time of his injury rather than the nature of his general duties which is determinative of the question whether the Longshoremen's and Harbor Workers' Compensation Act or the F. E. L. A. (or Jones Act) governs the employee's rights for injuries sustained

in the course of his employment. Thus in that case, the Court said (344 U. S. at p. 340):

> "An injured worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within §902(2), and whether he was a member of the crew of the vessel within the exceptions of §§902(3) and 903(a)(1). This explains the emphasis on the factor of the individual's job in Parker *v.* Motor Boat Sales, Inc., 314 US 244, 245, 246, 86 L. ed. 184, 188, 189, 62 S. Ct. 221, and South Chicago Coal & Dock Co. *v.* Bassett, 309 US 251, 84 L. ed. 732, 60 S. Ct. 544."

As pointed out by this Court in that case, by reference to lower court decisions (see footnotes 6 and 7, 344 U. S., pages 340 and 341), the test of the "particular activity at the time of injury" rather than "the nature of his regular work", as determinative of the injured employee's rights, has been consistently applied by the Circuit and District Courts.

As recently as February 25th, 1957 this Court in *Senko* v. *La Crosse Dredging Corporation,* 352 U. S. 370, 371, again reiterated that "the Longshoremen's and Harbor Workers' Compensation Act * * * restricts the benefits of the Jones Act to 'members of a crew of a vessel' "; adding: "To recover, therefore, petitioner had to be a member of a crew as that term is used in the Longshoremen's Act, at the time of his injury".

Where the evidence is not susceptible of contrary inferences, this Court has repeatedly treated the question whether the injured man's rights afford a remedy under the Federal Employers' Liability Act, the Jones Act, or the Longshoremen's and Harbor Workers' Compensation Act, even in cases brought on the civil side of the court before a

jury, as one of law and has disposed of cases brought before it on that basis. *Nogueira* v. *New York, N. H. & H. R. Co., supra; Desper* v. *Starved Rock Ferry Co., supra; Pennsylvania R. Co.* v. *O'Rourke, supra.*

It is only where the evidence gives rise to permissible contrary inferences that the question has been treated by this Court as one of fact. *Senko* v. *La Crosse Dredging Corporation, supra, Grimes* v. *Raymond Concrete Pile Company,* 356 U. S. 252.

The undisputed facts in the present case allow of no inference that at the time the plaintiff sustained his injury he was engaged in the performance of any work or activity in the course of employment as an officer or member of the crew of any vessel. It is undisputed that plaintiff had been employed by the defendant as a member of the crew of the *Pfeifer No. 2* for approximately four months prior to his injury and that up to a short interval prior to his injury he had actually been engaged in the performance of employment for the defendant as a member of the crew of that vessel. It is equally undisputed, however, that at the time plaintiff sustained his injury, he had ceased to perform any functions in the course of his employment as a member of the crew of the *Pfeifer No. 2,* and was then engaged in the performance of work for his employer as a shipyard carpenter. There is no evidence whatever that the work which plaintiff was performing at the time of his injury had any relationship whatever to the barge *Pfeifer No. 2* upon which he had been employed as a crew member (R. 23). The only evidence on the subject is directly to the contrary (R. 48). Under these circumstances the evidence did not afford a permissible inference that at the time plaintiff sustained his injury, he was engaged in the course of employment as a member of the crew of the *Pfeifer No. 2* and accordingly,

no basis has been laid for the maintenance of suit under the Jones Act to recover for the injury involved.

Petitioner professes confusion (p. 8, Petitioner's Brief) as to the implication of the decision of the Court of Appeals in its conclusion that petitioner "was subject to the Longshoremen's Act, not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of the *Pfeifer No. 2*" (R. 73-74). The Jones Act by its terms is applicable to "any seaman who shall suffer personal injury in the course of his employment". The Longshoremen's Act, which this Court has held supersedes and restricts the application of the Jones Act (*Swanson* v. *Marra Bros., Inc., supra*), excludes from its operation not "any seaman" but "a master or member of a crew of any vessel" (33 U. S. C. A., Sec. 903(a)(1)). Thus it is necessary in order that the Jones Act may afford a remedy that the man must be both a seamon and a master or member of a crew of a vessel.

The principle which has uniformly run current through all of the decisions of this Court on the subject is that the particular activity in which a man is engaged at the time of his injury must be looked to, to determine whether he is a seaman and a member of a crew of a vessel as regards the remedy afforded him to recover for such injury. Thus the Court of Appeals in concluding that the man was subject to the Longshoremen's Act and not to the Jones Act, because he was not injured in the course of his employment as a seaman or as a member of the crew of the *Pfeifer No. 2*, involves no difficulty of comprehension.

Petitioner seeks to support his petition by a factitious argument directed against the two disjunctives of the conclusion of the court below. It will be conceded that if the work petitioner was performing at the time of his injury was calculated to further the mission of the vessel (as

stated by petitioner at p. 9 of his brief), that a Jones Act recovery would be available; but there is no evidence whatever in this case that petitioner's work was in any wise calculated to further the mission of the vessel upon which he had been employed as a member of the crew, namely, the *Pfeifer No. 2*. The only evidence is that his work furthered the mission of completing the deck of the work raft, which neither was being or was to be, employed in connection with any work then being performed on or in connection with the *Pfeifer No. 2*.

Petitioner poses quixotic suppositions as to why petitioner was not a seaman at the time of his injury: such as, the alleged lay-off, the place of the accident, and that the *Pfeifer No. 2* was not in transit, which petitioner then proceeds to attack as invalid (p. 10, Petitioner's Brief). There has been no suggestion by the respondent at any time in this case, and there is none in the decision of the Court of Appeals, that any of these supposititious circumstances have anything whatever to do with the decision of this case.

The only contention advanced by petitioner which deserves any consideration is the question posed at the bottom of page 10 and the top of page 11 of Petitioner's Brief, where it is asked whether, if petitioner was in the course of performing the work of a carpenter, placing a deck on a raft in a ship repair yard that takes him out of the class of a seaman. Therein petitioner finally arrived at the nub of the case; and, of course, the question posed must be answered in the affirmative; since although a seaman may have handled carpenter's tools, as contended by the petitioner since the days of the Phoenicians, petitioner was not in the course of doing work as a ship's carpenter but as an ordinary shipyard carpenter.

Similarly in his argument directed against the conclusion that petitioner was not hurt in the course of his employ-

ment as a member of the crew of the *Pfeifer No. 2,* suppositious circumstances are presumed and then attacked. The cases cited at pages 12-13 of Petitioner's Brief would have application if the petitioner's work at the time of his injury was related to the *Pfeifer No. 2*—but it was not. This is apparent from the decision of this Court in *Senko* v. *La Crosse Dredging Corporation, supra,* upon which reliance is so heavily placed by petitioner. That case is clearly distinguishable on its facts; since the work the man was performing at the time had direct relation to the vessel upon which he was employed. The element of the case, which it was argued would take the man out of the operation of the Jones Act, was the place of the occurrence. This had long since been dismissed by this Court as a basis for distinguishing between the application of the Jones Act and the Longshoremen's Act in *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* and *Swanson* v. *Marra Bros., Inc., supra.* In *Butler* v. *Whiteman,* 356 U. S. 271, this Court merely held that there were jury questions.

Petitioner seeks to support his position by arguing that the jury could suppose that the raft would be used for the doing of the kind of work which petitioner, as a member of the crew of the *Pfeifer No. 2,* might be called upon to perform from time to time, such as the painting of, or the making of minor repairs to, the *Pfeifer No. 2;* but the proof is that the raft was not being so used and was not at the time contemplated to be so used.

The further argument is made that since the man had received a payment from his employer, which in the question put to him by his attorney was characterized as maintenance and cure (R. 61-62), this was evidence from which an inference could be drawn that petitioner was entitled to maintain suit under the Jones Act, and that his exclusive remedy was not under the Longshoremen's

Act. The only case cited in support of this rather surprising statement is *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (p. 13, Petitioner's Brief). That case had to do merely with the admission of reports made by employees of the defendant and adopted by the defendant, as admissions against interest. Its relevance here is difficult to comprehend.

It is not until petitioner arrives at the last sub-heading under his Point I that he reaches the real question involved in this case, wherein he argues that: "The nature of Braen's services when injured is irrelevant to his right to a remedy under the Jones Act" (p. 14, Petitioner's Brief). The case in this Court upon which principal reliance in support of this contention is placed is *Senko* v. *La Crosse Dredging Corporation*, *supra*. The quotation given from that case, at page 18 of Petitioner's Brief, clearly shows that the *Senko* case does not in the least depart from the consistent principle uniformly applied in cases involving the question here presented; wherein this Court has stressed over and over again that coverage under the Jones Act depends upon the happening of an injury to a crew member engaged in the course of his employment as such at the time of injury. That is not the case here. Here the work that petitioner was doing had no relation whatever to his employment as a member of the crew of the *Pfeifer No. 2*.

The only other cases from this Court cited under this sub-heading are, *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 249, *South Chicago Coal & Dock Co.* v. *Bassett*, *supra*, and *Swanson* v. *Marra Bros., Inc.*, *supra*, which are cited for the proposition that the Longshoremen's and Harbor Workers' Compensation Act "was never intended to affect or limit in the slightest the traditional rights and remedies of seamen, members of a crew". Of course, the

Jones Act is not one of the traditional rights and remedies of seamen, members of a crew, but a comparatively recent statutory remedy.

The *Parker* case upheld an award in compensation under the Longshoremen's and Harbor Workers' Compensation Act. The questions involved were, whether the man's death arose in the course of his employment, and whether recovery was barred because recovery could have been had through Workmen's Compensation proceedings provided by State law. There is nothing in the case touching on the question here involved, other than the stress which was placed in the decision upon the factor of the work being performed by the decedent at the time of his death, as noted by this Court in *Pennsylvania R. Co.* v. *O'Rourke, supra*, (344 U. S. at p. 340).

South Chicago Coal & Dock Co. v. *Bassett, supra*, also involved an award in compensation under the Longshoremen's Act for the death of a man who was drowned "while serving his employer on a vessel in navigable waters of the United States". The Commissioner had found that the man was not a member of a crew of a vessel within the exception in the Compensation Act. This finding was reversed by the District Court, the District Court was in turn reversed by the Circuit Court, and the question considered by this Court was whether or not there was evidence in the record before the Compensation Commissioner to sustain his finding. Contrary to the contention of the petitioner, the case very definitely again makes it plain that the Longshoremen's and Harbor Workers' Compensation Act supersedes and restricts the operation of the Jones Act. Thus in that case this Court said (309 U. S. at p. 256):

> "For those employees who are entitled to compensation, the remedy under the Act is exclusive.

§5. This made inapplicable to such employees the provision of §33 of the Merchant Marine Act (called the Jones Act) which carried to 'seamen' at their election the benefit of the provisions of the Federal Employers' Liability Act".

Swanson v. *Marra Bros., Inc., supra,* specifically involved the question whether one performing work which had previously been held by this and lower courts to be seamen's work could, notwithstanding the enactment of the Longshoremen's and Harbor Workers' Compensation Act, maintain a suit under the Jones Act for an injury sustained in the course of his employment. This Court specifically rejected that contention. (See the quotation from the *Swanson* case at p. 6, *supra.*) At least three times in that decision did this Court specifically note that the effect of the Longshoremen's Act was to restrict or limit the application of the Jones Act to injuries sustained by an employee who is either a master or member of a crew when injured in the course of his employment as such.

In none of the cases cited by petitioner is there the slightest suggestion that the Longshoremen's Act did not have the effect of restricting the operation of the Jones Act.

There is no more reason in logic and principle why the Longshoremen's Act, which supersedes and restricts the effect of the Jones Act, is not applicable to the case of a man, whose usual work is that of a seaman and whose general employment is that of a member of a crew, when an injury occurs in the performance of a service not that of a seaman or a member of a crew of a vessel, than there is that an injury affecting a man whose usual work is not that of a seaman and who is not generally employed as a member of a crew, may have a Jones Act remedy because

the particular activity in which he was engaged at the time of his injury is that of a seaman and member of a crew, thus excluding him from recovery under the Longshoremen's and Harbor Workers' Compensation Act.

Neither is there any more reason in logic and principle why the Longshoremen's Act should be held to provide the sole remedy in the case of a man whose general employment is that of a railroad freight handler (*Nogueira* v. *New York, N. H. & H. R. Co., supra*), or a brakeman (*Pennsylvania R. Co.* v. *O'Rourke, supra*), and whose usual remedy would be under the Federal Employers' Liability Act, than there is for holding the Longshoremen's Act the exclusive remedy, because of the particular activity in which the man was engaged at the time of his injury, in the case of a man who, if performing his usual functions, would have a remedy under the Jones Act.

What is there in the Jones Act, which incorporates and embodies the Federal Employers' Liability Act, to make the Jones Act more sacrosanct than the Federal Employers' Liability Act? Why should not the Longshoremen's Act similarly restrict the Jones Act to which it is more directly related, as it does the Federal Employers' Liability Act to which it is more remotely related?

Unless this Court is now prepared to reverse the clearly defined principles which have uniformly pervaded its decisions dealing with the application of the Longshoremen's and Harbor Workers' Compensation Act, vis-a-vis the Jones Act and the Federal Employers' Liability Act since the enactment of the Longshoremen's Act, it is respectfully submitted that the decision of the Court of Appeals reversing the judgment of the District Court and dismissing the complaint must be affirmed.

POINT II.

The District Court failed to adequately and properly instruct the jury and erred in denying defendant's requests to charge.

Assuming, *arguendo,* that it would have been permissible under the facts disclosed in this case for the jury to draw an inference that plaintiff at the time he sustained his injury was performing work in the course of his employment as a member of the crew of the *Pfeifer No. 2* as such, it was necessary for the jury to have some norm which they could apply to determine whether they should or should not draw such inference. The District Court gave the jury no instructions on the subject other than the following (R. 5):

> "Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

The plaintiff had testified that prior to his injury when his boat was at the repair yard, he had at times worked on land in the yard and at other times on the *Winisook:* "Wherever we were ordered to go, we went" (R. 28). There had also been testimony that during the time he had been employed by the defendant, he was always carried on the payroll of the barge (R. 39). Under the instructions as given by the Court, the jury might well have inferred that if the plaintiff had at other times done work around the yard not in connection with the maintenance of the *Pfeifer No. 2,* since he was carried on the payroll of the

barge during such periods, this would be sufficient for them to infer that at the time of his injury he was actually engaged in the course of his employment as a member of the crew of the *Pfeifer No. 2.* Under the law, as is well established by the cases referred to in our preceding point, particularly *Swanson* v. *Marra Bros., Inc., Nogueira* v. *New York, N. H. & H. R. Co., Desper* v. *Starved Rock Ferry Co.* and *Pennsylvania R. Co.* v. *O'Rourke,* the performance of such functions on other occasions while carried on the barge payroll, would not entitle plaintiff to be deemed an officer or member of the crew of a vessel entitled to maintain suit under the Jones Act for the injury in suit.

To make matters even worse in the present case, the Court had prefaced the instruction quoted above with the following statement (R. 5):

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that *at the time of the accident* he was a member of the crew." (Italics supplied.)

This had been a seriously disputed issue throughout the trial. It had been made the basis of a motion to dismiss at the close of plaintiff's case (R. 43-44). It had again been made the basis of a motion for a directed verdict at the close of the entire case (R. 52-54). It was the basis of specific requests to charge submitted to the Court by the defendant (R. 10-11). The fact that when exception was taken to that part of the Court's charge (R. 9), the Court before dismissing the jury said: "Apparently according to the defendant's statement, he says that is a serious issue. So I will leave that as an issue" (R. 10), hardly served to correct the effect of the charge; for it still left the jury without any norm or basis to determine whether

or not plaintiff at the time of his injury was engaged in the course of employment as a member of the crew of the barge *Pfeifer No. 2.* This was specifically called to the Court's attention by exception (R. 9) and exception was also taken to the failure of the court to charge any of the defendant's requests (R. 9-10).

We submit in the instant case the purpose of Rules 51 and 46 F. R. C. P., to inform the trial judge of possible errors and to clearly advise it as to the question of law involved has been adequately fulfilled. *United States* v. *General Motors Corporation,* 226 F. 2d 745, 750; *Montgomery* v. *Virginia Stage Lines, Inc.,* 191 F. 2d 770. The Court in *Montgomery* v. *Virginia Stage Lines, Inc.,* said (at page 772):

> " '* * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. * * *' Chicago & N. W. Ry. Co. *v.* Green, 8 Cir., 1947, 164 F. 2d 55, 61; see, also, Cobb *v.* Capital Transit Co., 1945, 79 U. S. App. D. C. 364, 148 F. 2d 217; Feldmann *v.* Connecticut Mut. Life Ins. Co., 8 Cir., 1944, 142 F. 2d 628, 631. Though the requests were not entirely correct as instructions on the case as a whole, the gist of them was sufficiently important and clear to require their substance to be given.
>
> " 'While a party may not complain of the refusal of a requested instruction which does not correctly state the law, the court being under no obligation to reframe a request so as to contain an accurate statement of the law, yet where, as here, the meaning of a request is reasonably apparent, and its subject-matter is important and not sufficiently covered by the general charge, a court would not be justified in ignoring the request merely because susceptible of

such an interpretation as to make its proposition not absolutely accurate.' * * * Rothe *v.* Pennsylvania Co., 6 Cir., 1912, 195 F. 21, 25; to like effect are E. I. Du Pont De Nemours & Co., *v.* Frechette, 8 Cir., 1947, 161 F. 2d 318, 323; Pfotzer *v.* Aqua Systems, 2 Cir., 1947, 162 F. 2d 779, 783; and Chicago & N. W. Ry. Co. *v.* Green, supra. Compare Capital Traction Co. *v.* Copland, 1917, 47 App. D. C. 152, 162."

We feel that in the present case the defendant's requests were perfectly correct and appropriate to the case under the facts as developed. They served to highlight the real issue in the case and to call to the attention of the jury the elements which it was necessary for them to consider (if an inference favorable to the plaintiff could be drawn from the facts of the case) in order to draw a correct inference under the law. But even if the requests were not entirely correct, as instructions on the case as a whole, as said by the Court of Appeals for the District of Columbia in the above quotation, "the gist of them was sufficiently important and clear to require their substance to be given". In this case, the subject matter was, as stated in the foregoing quotation, "important and not sufficiently covered by the general charge"; and accordingly, the Court was not "justified in ignoring the requests merely because susceptible of such an interpretation as to make its proposition not absolutely accurate".

Certainly it is true that under the decisions of this Court in *Nogueira* v. *New York, N. H. & H. R. Co., Desper* v. *Starved Rock Ferry Co.,* and *Pennsylvania R. Co.* v. *O'Rourke,* the mere fact that the plaintiff had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury did not in and of itself entitle him to a recovery in this case (Request No. 1, R. 10). Clearly, it is true also

under all of the cases cited in our preceding point that it is the nature and character of the work being performed at the time the injury is sustained which is determinative of whether or not the plaintiff is entitled to a recovery (Request No. 2, R. 11). Since the plaintiff in the instant case in order to be entitled to recover from the defendant under the Jones Act, must have sustained his injury in the course of employment as an officer or member of the crew of a vessel, and the only vessel of which he claimed to be a crew member was the *Pfeifer No. 2,* the work which he was performing had to be related to the navigation of the *Pfeifer No. 2* (Request No. 3, R. 11).

It has uniformly been held that for an employee to be considered a member of a crew of a vessel, his work must be of such character as naturally or primarily to aid in navigation, and not a service such as that of laborers of the sort performed by harbor workers. In *Senko* v. *La Crosse Dredging Corp., supra,* where this Court reversed the Fourth District Appellate Court of Illinois on the ground that there was evidence to support the jury's finding that petitioner was a member of the crew performing service as such at the time he sustained his injury, the jury's finding had been made "under specific instructions not objected to" (352 U. S. at p. 372). Not only in this Court, but also in the lower Courts has it uniformly been held that the service being performed out of which the injury arises must be related in some way to navigation for the injured employee to be considered a crew member at the time of his injury. See for example, *Seneca Washed Gravel Corporation* v. *McManigal,* (C. A. 2) 65 F. 2d 779; *Hawn* v. *American S. S. Co.,* (C. A. 2) 107 F. 2d 999; *Antus* v. *Interocean S. S. Co.,* (C. A. 6) 108 F. 2d 185; *Long Island R. Co.* v. *Lowe,* (C. A. 2) 145 F. 2d 516.

Defendant's Request No. 4 (R. 11), which was an application of the rule to the particular facts of the instant case, or substantially a similar charge, directing the attention of the jury to the particular fact findings which it was necessary for them to be able to make in order to grant plaintiff a verdict in this case, was not only appropriate but, it is respectfully submitted, absolutely necessary. Without such a charge, in view of the very general charge on the subject given by the Court which established no guide or norm to aid the jury, the jury was left free to award a verdict on the basis of their own notions without any basis in law to support that verdict.

Petitioner asserts that respondent's Request No. 1 was properly denied because it was in the negative, posing other negatives which might have been suggested although wholly inapplicable to the case (p. 20, Petitioner's Brief). In the instant case petitioner had been employed as a seaman on board the *Pfeifer No. 2* for a substantial period of time up to but briefly before his accident. There was evidence that because of a union contract he could not be disassociated from such employment status without three days' advance notice. There was evidence from which the jury could find his payroll classification had not been changed prior to his injury. Under all these circumstances, unless it was made clear to the jury that the mere fact that he had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury was not determinative of his right to maintain suit under the Jones Act, there was ample evidence from which the jury might *incorrectly* infer that the mere fact that he had the employment status of a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury was sufficient to enable him to maintain his action and entitle him to recov-

ery. This is particularly true in the instant case because the Court in its charge said: "It does not seem to be seriously disputed that at the time of the accident he was a member of the crew", and left the question to the jury whether he was entitled to maintain his action upon the sole test of functions which the man had himself testified he had on prior occasions performed (even though not related to the maintenance of the *Pfeifer No. 2*) while being carried on the payroll as a crew member (R. 5). Thus the jury might well have inferred that it was sufficient for them to determine that he had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his accident in order to entitle him to have a verdict in this case.

Petitioner dismisses respondent's Request No. 2 as being general and abstract and in any event as having been substantially charged (p. 21, Petitioner's Brief). This is obviously not so. There is nothing in the charge to indicate to the jury that the nature and character of the work being performed was an essential fact for determination in connection with petitioner's right to a verdict. Moreover, Request No. 2 must be taken together with Request No. 3 which points up the correct application of the pertinent law, that unless the work being performed was in connection with the furtherance of the navigation of the vessel upon whose payroll petitioner was carried as a crew member, there would be no legal basis for a petitioner's verdict. That the work must be related in some way to navigation, for the injured employee to be considered a crew member engaged in the course of his employment as such at the time of his injury and thus entitled to maintain suit under the Jones Act is thoroughly established as has been previously demonstrated.

Petitioner attacks respondent's Requests Nos. 3 and 4 because they use the term "navigation", arguing that this is a term of art incomprehensible to the layman-juror. The argument is spurious both in conception and in presentation. The context of the charge obviously did not relate to the "art or science of laying out a ship's course" (p. 21, Petitioner's Brief). The word in the context of the requests obviously referred to the vessel's being continued in operation as a navigating vessel. The vessel was in the repair yard to repair a pump in order that she could be continued in use.

Clearly, we submit, respondent's Request No. 4, which applied the law to the undisputed facts of the case and left it to the jury to consider whether the work being performed by the petitioner at the time was being done "for the purpose of furthering the repair of the *Pfeifer No. 2* in order to enable it to continue in navigation" was appropriate under the facts of this case. Its denial clearly deprived the respondent of a proper submission of the case to the jury.

Conclusion.

The judgment of the Court of Appeals for the Second Circuit should be affirmed, or if reversed, the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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